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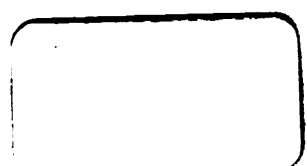
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PRACTICE REPORTS

N. H. IN THE

~~WESTERN NEW YORK~~
SUPREME COURT

AND

COURT OF APPEALS

OF THE

STATE OF NEW YORK.

BY NATHAN HOWARD, JR.,

COUNSELLOR AT LAW, ALBANY.

VOL. V.

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PRACTICE REPORTS.

SUPREME COURT.

THE PEOPLE agt. HAWKINS & CLARKE.

A *misnomer* of the court, in a recognizance, called "*General Sessions of the Peace*," instead of "*Court of Sessions*," as designated by the Code (1849), *held*, to be immaterial—the unnecessary additions to the title may be regarded as surplusage.

Oneida Special Term—Demurrer to Complaint.

BRUYN & WILLIAMS *for Defendants.*

C. COMSTOCK, *for Plaintiffs.*

GRIDLEY, Justice.—On the 1st of May 1849, the defendants executed a bastardy bond, conditioned that the defendant Clarke should appear at the next *Court of General Sessions of the Peace* to be held in Oneida county.

The defendants' counsel insist that there was no such court in existence; and by necessary consequence the defendants were not in default for the omission of Clark to appear at the next Court of "*Sessions*" held in the said county. This argument is founded in an alleged *misnomer* of the court, and it seems to me is quite too technical to be upheld. The *Constitution* of 1846, Art. VI., Sec. 14, provides that the county judge with two justices of the peace, &c., may hold "*Courts of Sessions*." Under that power the Code of 1848 speaks of these courts as "*Courts of General Sessions of the Peace*," in sections 9 and 38; while

according to the nomenclature of the Code of 1849, they are called "Courts of Sessions" in sections 9 and 32. Now these expressions all designate the same class of courts; and no one can be misled by the adoption of the designation employed in the Code of 1848. On the contrary, it is more definite and less liable to be confounded with the Courts of Special Sessions, if that were a possible case. A few citations from our former statutes will show how unimportant the exact, or even the uniform designation of courts has always been deemed in this state. In the Constitution of 1777, the Supreme Court of Judicature is designated simply as "*The Supreme Court*," but in the Statutes it is designated as "The Supreme Court," "The Supreme Court of Judicature," and "The Supreme Court of Judicature of the People," &c. (See 1 R. Laws, 39, sections 24, 25, and 27; page 243, sections 1, 2 and 3; page 318, sections 1 and 3). Again: In the Constitution of 1821, this court is again designated as the "Supreme Court," simply (*Art. 5, sec. IV*). The same title is attributed to this court, probably, a hundred times in the Revised Statutes, while in the 14th section of the act concerning the Supreme Court, it is denominated "*The Supreme Court of Judicature*," and in the (9th) 18th section, process is made returnable "before the justices of *our Supreme Court of Judicature*," &c.; and in the 11th section it is enacted that the style adopted in pleadings and records shall be "before the justices of the Supreme Court of Judicature of the People of the state of New York."

The county courts, including the sessions, are recognized, simply by the name of "County Courts," in the Constitution of 1821, *art. 5, sec. 6*. The county courts of criminal jurisdiction are designated by the legislature as "Courts of General Sessions" (2 R. S. p. 208, *secs. 3 and 4*); while in section 5 of the same title they are called "*General Sessions of the Peace*," and these expressions are employed as convertible phrases in all parts of the statute.

I can not doubt, therefore, that the misnomer of the court, as stated in the recognizance, is wholly immaterial; and the unnecessary additions to the title of the court may be regarded as a

Vernam *agt.* Holbrook.

surplusage. A "*descriptio curiæ*" may be treated like the "*descriptio personæ*," and any circumstance, false or mistaken, which does not mislead may be disregarded.

II. Under the liberal construction which is to be applied to pleadings, under the provisions of the Code, the allegation in the amended complaint that the justice proceeded to make an examination of the matter, &c., is sufficient, even if it were necessary that the mother should in all cases be reexamined. But cases may arise in which such reexamination may be dispensed with; as, for instance, where it was waived. If any irregularity occurred in the proceedings of the justices as to make this order a nullity for the want of jurisdiction, that fact may be set up in the answer. Upon the averment in the complaint, it will not be presumed that the justices acted without jurisdiction.

The demurrer must be overruled with costs, and defendants may amend on payment of costs.

SUPREME COURT.

VERNAM *agt.* HOLBROOK.

The statute does not expressly require the filing of the affidavits on which an order is made for publication in case of a non resident defendant; and where the affidavits filed were defective, and it appeared there was another sufficient affidavit used before the judge on procuring the order which had not been filed, a motion to set aside the order was denied.

In such proceedings, the fact of non residence is evidence that the defendant can not, after due diligence, be found within this state.

Albany Special Term, August 1850. This was a motion to set aside an order for service of a summons by publication, made under § 135 of the Code, on the ground that it had been allowed on insufficient affidavits. The facts and the objections made, appear sufficiently in the opinion of the court,

N. HILL, JR., *for Defendant.*

J. K. PORTER, *for Plaintiff.*

Vernam agt. Holbrook.

PARKER, Justice.—Two affidavits were annexed to and filed with the order for publication. It would naturally be supposed that the order was made on those affidavits, though the order does not refer to them. These affidavits are insufficient, inasmuch as they do not show that the plaintiff's cause of action arose on contract, and it is at least doubtful whether they show sufficiently that the defendant has property in this state. But the plaintiff's attorney now produces another affidavit, which purports to have been sworn to on 4th June last, two days before the order was made and filed, and which he swears was used before the judge for the purpose of obtaining the order. In this affidavit both the above mentioned defects are supplied.

The Code does not expressly require that the affidavits shall be filed, nor does it provide what shall be done with them. It is the practice, either to leave them with the judge or to file them. It does not appear who has had the custody of this affidavit since it was used before the judge, on obtaining the order. It is certainly singular that but two of the three affidavits should be annexed to and filed with the order; but there being no statutory provisions for the custody of the affidavits, and the statement of the attorney that the third affidavit was used before the judge for the purpose of obtaining the order, being uncontradicted, I think I am bound to regard it as a part of the foundation for the order.

This proceeding is authorized when it shall appear that the defendant can not, after due diligence, be found within this state (*Code*, § 135). The meaning of that section is not clearly expressed; but I do not think it was intended that an attempt must first be made to serve process where the defendant is a non resident. That would seem only to be requisite where the defendant keeps himself concealed within this state. The fact of non residence is evidence that the defendant could not, after due diligence, be found within this state, and so it was held in *Rawdon vs. Corbin* (3 *How. Pr. R.*, 416).

The motion must be denied, but the defendant being misled by the filing of only two of the affidavits, no costs are allowed.

NEW-YORK PRACTICE REPORTS.

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Spellman and others agt. Weider and others.

SUPREME COURT.

SPELLMAN and others, agt. WEIDER and others.

A party can not demur and answer to the same pleading.

If a defendant answers and demurs to the same complaint, the proper remedy of the plaintiff is to move for an order striking out one of the pleadings, or to compel the defendant to elect by which he will abide.

The plaintiff can not in such case move for judgment on account of the frivolousness of the demurrer.

What facts should be stated in a complaint against the makers and endorsers of a promissory note, when they are all united in the same action, under § 120 of the Code.

August 20, 1850. The complaint is on a promissory note against maker and endorsers. The defendants have answered, denying all the allegations of the complaint and have also demurred to the same.

The plaintiffs now move for judgment on account of the frivolousness of the demurrer, under § 247.

B. C. THAYER, *for the Motion.*

C. R. INGALLS, *Contra.*

WILLARD, Justice.—The plaintiffs have mistaken their remedy. No judgment can be given for the plaintiffs until the issue of fact on the record is disposed of. It is very clear that the defendants can not both answer and demur to the same pleading. This was so held by HARRIS, J., in *Slocum vs. Wheeler* (4 How. Pr. R., 373). It has been so ruled also in this district in a case not reported. The plaintiffs, however, can not treat the answer as a nullity, and move for judgment on the ground that the demurrer is frivolous; nor can they treat the demurrer as a nullity. The proper remedy is to move to strike out the demurrer or the answer; or for an order compelling the defendants to elect by which of the pleadings they will abide (*Slocum v. Wheeler, supra*). If the objection appear on the face of the complaint, it must be taken by demurrer, or it is waived, unless it be an objection to the jurisdiction of the court, or the want of a cause of action

(§ 148). If the objections do not appear on the face of the pleading, it may be taken by answer (§ 147).

The defendants' counsel insists that the complaint does not show any cause of action. This would be a good answer to the motion for judgment on account of the frivolousness of the demurrer, but it would be no ground for a judgment for the defendant at this time. The plaintiffs have made this motion at chambers under §247. I have no authority to give judgment at chambers, under this section, unless the demurrer is frivolous. If the demurrer be well taken, the present motion must be denied. Judgment can not be given until the cause shall be brought to trial at a special term.

As the present motion must be denied, and as the defendants have been irregular, in putting in an answer and demurrer to the same pleading, it may be proper to look at the complaint with a view to the question of amendment and costs.

The action was well brought against the maker and endorsers (*Code*, § 120; *L. of 1832*, p. 489; *L. of 1835*, p. 248; *L. of 1837*, p. 72). The mode of declaring, prior to the Code, was to declare on the money counts, and to annex a copy of the note. This simple form of declaring is abolished by the code, and as a substitute, the complaint must contain a statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended (§ 142). The contract of the maker of a note is to pay it according to the terms of it; the contract of the endorser is, that the maker will pay on presentment according to the terms of the instrument, or on his default, he the endorser, on due notice of such demand and non payment, will pay. The complaint, therefore, in order to conform to the Code, should state facts enough against the maker to show his liability to pay, and enough against the endorser to charge him with the debt. In the latter case, not only the making and endorsement of the note should be stated, but also the demand of the maker at the time and place prescribed for that purpose, and notice of such demand and non payment to the endorser. This demand must be on the third day of grace,

and notice of demand and refusal given afterwards on the same day or the next. If the third day be Sunday, or a day of public rest, the demand must be made on the second day, and notice will be in season, if given on the day succeeding such day of rest (*See 3 Kent Com.* 102, 105, &c). The complaint in this case does not show a demand of the note at the *place* where it was payable, nor does it show notice of such demand and non payment, as against the endorsers; a demand at the place appointed in the note for payment was necessary (11 *Wheaton*, 171). As against the maker this was of no consequence; but as the plaintiffs have chosen to unite both maker and endorsers in the same action, their statement of facts should have been full enough to show the liability of both.

Whether the 7th section of the act of 1832 (*L. p.* 490), which was framed to preserve the rights and responsibilities of the several parties to the note, as between each other, will justify the court in treating a joint complaint as two separate complaints, the one against the makers and the other against the endorsers, can not arise on this occasion, as the demurrer and the answer were both joint and by all the defendants to the whole complaint. Had the maker answered by himself, and the endorsers demurred by themselves, a question could fairly have been made as to the effect of that section; but it is not expedient to decide a hypothetical case.

I shall not give costs to the defendants because they have been irregular themselves. If the plaintiffs should hereafter move to compel the defendants to elect between their answer and demurrer, they might connect with it a motion for leave to amend their complaint. I would suggest to the parties that a rule be now ordered, allowing the plaintiffs to amend their complaint, and the defendants to put in a new answer or demurrer as they shall be advised, without costs to either party. Ordered accordingly.

Dodge agt. Averill, impleaded with Shepard and Williams.

SUPREME COURT.

DODGE agt. AVERILL, impleaded with SHEPARD & WILLIAMS.

In actions for a tort commenced before the Code, a defendant on whom process was not served, and who has not appeared, can not be a witness for a co-defendant, whom he is liable to indemnify in case of recovery. He is nominally a party and interested (§ 398-9).

St. Lawrence Special Term, Dec. 1849. This was a motion on the part of the defendant Averill for a commission to examine his codefendant Shepard, now living in Wisconsin. The action was trover, to recover a quantity of timber, and was commenced in November 1847, and had been referred and considerable testimony taken before the referee, and an adjournment granted for the purpose of making this motion. No process had been served upon Shepard, nor had he appeared in the cause; but he was liable to the defendant Averill, who was his vendee, for the value of the property if the plaintiff should succeed. The papers made out a strong case of necessity for the testimony of Shepard, and an excuse for not making the motion before.

It was clear from the papers, that if the plaintiff has a cause of action against Averill, he has also against Shepard. But it was contended that any defendant on whom process has not been served may be examined for a codefendant in an action for a tort. That where there is no service upon him and the suit proceeds without him, it is not a suit against him, and there being no privity of contract nor any contribution between them, the defendant not served, was always a competent witness. But that if this were otherwise, the Code has provided for the examination of a codefendant as a witness in ordinary cases (*Code*, § 397). On the other hand it was denied that a codefendant in an action for a tort can be a witness; and it was also insisted that there is no power under the Code to issue a commission to examine a coplaintiff or codefendant; those provisions only extending to witnesses and the opposing party. And again, that if this were not so, the delay in this case was fatal to the motion.

Dodge agt. Averill, impleaded with Shepard and Williams.

C. J. MYERS, *for the Motion.*

A. B. JAMES, *Contra.*

HAND, Justice.—In England, one against whom process in an action for a tort is issued, although not served, is still considered a party to the suit, and as such it seems can not be examined as a witness (1 *Phil. Evi.*, 74; *Bull. N. P.*, 286; 2 *Stark. Evi.*, 766; and see 2 *Campb.*, 334 n; *Gilbert Evi.*, 232; *Bohun v. Taylor*, 6 *Cow.*, 313). Our courts have decided he may be a witness if not liable over to his codefendant upon whom service has been made, as contributor or warrantor; confining his incompetency to a fixed legal interest (*Stockham v. Jones*, 10 *J. R.*, 21; *Van Orden vs. Striker*, 9 *Wend.*, 286). And I am aware that Mr. Justice Spencer in *Rose vs. Oliver*, intimates that the party not taken, is not a party to the suit (2 *J. R.*, 368); and the reporter has repeated this in the margin to *Bohun vs. Taylor* (6 *Cow.*, 313). But in *Rose v. Oliver*, the declaration charged two defendants with committing the trespass together with a third named in the writ, but not taken; and that was held good after *verdict*; and that is all that was there decided. (And see note to 19 *Vin.*, 476). Bleecker and Sudam, good lawyers, contended strenuously against even this position. And cited *Hobart*, 199, a, where it is said, “if four commit a trespass (which in its nature is joint and several), yet if the plaintiff will bring his action against one only, and declare that he with the other three did the trespass, his action shall abate.” This would have been good after verdict in this state, before the code. (And see *Tory’s case Styles R.*, 15, and *Barker vs. Martin*, *id.*, 20).

SPENCER, Justice, gave the opinion in *Rose v. Oliver*, and thought *simul cum* and *simul cum quodam* J. S., &c., the same in effect, and then adds, “if then the two modes of declaring are substantially alike, *Henly v. Broad* (1 *Leon.*, 41), is decisive that after verdict the defect is cured.” Trespass, it is said, is in its nature joint and several, as already remarked (*Brickhead vs. Archbishop of York*, *Hob.*, 199, a), and the plaintiff can treat cotrespassers as several (1 *Saund. R.*, 291, n; *Bayley v. Raby*, *Str.*, 420; *Govett v. Radnidge*, 3 *East.*, 62; *Mitchell v. Tarbutt*,

Dodge agt. Averill, impleaded with Shepard and Williams.

5 *T. R.*, 649). And the rule is the same in an action on the case (*Mitchell v. Tarbutt*, *supra*). But if by his own showing another was a party to the trespass, as declaring that those sued *simul cum*, J. S. committed the trespass, the old rule was that the action would abate (*Hob.*, 199, *a*; *Billings v. Crosby*, *Comb.*, 260; *Colt v. Bp. Cov. & Lick*, *Hob.*, 165). Though it seems where the writ was against two and one only taken, the plaintiff might declare against the one taken *simul cum* (*Holt in Billings v. Crosby*, 19 *Vin.*, 477). Nor would the action abate where the plaintiff declared that the defendant together with another person to the plaintiff unknown, committed the trespass (6 *Bac.*, 598; *Henly v. Broad*, *supra*). I am aware that these distinctions have been doubted (1 *Saund.*, 291, *n.* 1 *Chitt. Pl.*, 99). And I do not stop now to examine the rule upon this subject, but I notice them to show the effect and importance formerly attached to the joinder of a cotrespasser (And see *Edwards v. Carter*, 1 *Str.*, 473; *Goldsmith v. Levy*, 4 *Taunt.*, 299; *Lee's Dic.*, 984). But whatever may be the rule as to declaring there is no doubt but that the joinder prevented the defendant not served, from being a witness for his codefendant. In *Lill. Pr. Reg.*, it is said "where a joint action of trespass doth lie against divers persons, of whom some can be arrested and others can not, there the action may be brought against those that are arrested and do appear by their particular names, and against them that are not arrested with a *simul cum*, A. B., &c., viz., to charge them that are arrested, but not the parties in the *simul cum*, any farther than only to take off their evidence at the trial.

Note. The parties in the *simul cum* must be all of them named in the writ, and proved to be trespassers, otherwise their evidence will not be taken off; but they may be sworn to give evidence for the defendant" (1 *V.*, 34). And this is repeated in *Viner* (19 *V.*, 477). This was admitted by the court in *Jones v. Stockham* to be the old rule; and Mr. Justice Spencer, at the circuit on the trial of that cause followed the rule as laid down in *Buller's Nisi Prius* and *Lilly's Register*, and rejected a codefendant upon that ground, notwithstanding what he had said six years before in *Rose v. Oliver*. The court, as we have seen, granted a

Clerks' Fees.

new trial on the ground that he was not interested, for it did not appear that he was liable to contribute, or as warrantor. But they did not say he was not a party, nor was the case put upon that ground. They only overrule the old rule so far as to say, that being named in the writ shall not exclude, if we have no interest. It is not necessary to see what the rule would be if the suit was commenced under the Code by §§ 135, 136, 274; for these do not apply to old suits.

Interest alone does not now exclude a witness (*Code*, § 398). But if he be a party and also interested, he still remains incompetent (§ 399). Shepard, as we have seen, is a party to the action; and although usually there is no contribution among tortfeasors, yet here, as he is liable over to Averill, he comes within § 399. He could not have been a witness within *Stockham v. Jones* (and see *Curtis v. Monteith*, 1 *Hill*, 356). I do not think § 397 removes the objection. If that applies to what were actions at law at all, it is qualified by § 399; certainly where the party called is liable to make good, what the codefendant calling him, may lose by the suit (*Lord v. Brown*, 5 *Denio*, 349; *Stone v. Hooker*, 9 *Cow.*, 154). Motion denied.

5 *New. 11*—NOT IN CONFLICT. 47 *Superior* 525.

CLERK'S FEES.

What fees a county clerk is entitled to under the Code, as clerk of the Supreme Court.

At the General Term of the Supreme Court, held at Albany, in September, 1850.

PRESENT—Justices WATSON, PARKER, and WRIGHT.

Mr. STEVENS, in behalf of the county clerk of Albany county, submitted in writing certain questions, asking a construction of the Code as to allowances for clerks' fees.

The Court, after taking time for examination, delivered the following opinion:

Clerks' Fees.

By the Court: PARKER, Justice.—In addition to the questions submitted in behalf of the clerk, there have been several applications made to us by members of the bar, growing out of differences of opinion between themselves and the clerk. It is desirable that the rights and duties of clerks under the Code should be established beyond controversy.

Sec. 312 of the Code provides as follows: "The clerk shall receive on every trial, from the party bringing it on, one dollar;

On entering a judgment upon filing a transcript, six cents;

On entering judgment, fifty cents, except in courts where the clerks are salaried officers, and in such courts, one dollar.

He shall receive no other fee for any services whatever in a civil action, except for copies of papers at the rate of five cents for every hundred words."

It is no longer the policy of the law to compensate clerks by paying them for each separate service according to its value. It was supposed that by paying them for attending trials and entering judgments, a much higher sum than would remunerate them for those services, it would be a sufficient compensation for all their other services in civil actions. ●

The duties of clerks are in nowise lessened or changed. They must still attend at the general and special terms and circuits. They are responsible for the keeping of the minutes, the entering of orders, and the filing, arranging and preserving of papers, and for the proper discharge of all the other duties belonging heretofore to clerks of those courts; and they are amenable to the courts, and liable to parties for a neglect of such duties.

The clerk is not entitled to charge, in any case whatever, for entering in the rough minutes, or in the books, any rule or order. Where either party desires a copy of an order, or of any other paper, the clerk may charge for the same at the rate of five cents for every hundred words. There can be no additional charge for the certificate, or for the signature to the certificate. This provision extends to every entry made, and to every paper filed.

The clerk is allowed one dollar for every trial, to be paid by the party bringing it on. This extends to trials of issues of law,

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as well as issues of fact (§ 252). The clerk is therefore entitled to this fee for every cause actually tried at the circuit, including demurrers; and we think, though this is perhaps a matter of some doubt, that it extends to inquests and judgments by default under sec. 258, where due notice of trial has been given of issues joined in the cause; but it does not extend to causes on the calendar which are not tried, nor to trials before referees. The meaning of the statute evidently is that the fee is only to be paid to the clerk, when he attends and acts as clerk on the trial.

Under this provision, the clerk is entitled to one dollar for attending every argument at general term, on appeal from a *judgment* of an inferior court. The Code regards such argument as a trial on appeal (§§ 255, 318). This fee is therefore chargeable, whether it be on an appeal from a judgment rendered in the circuit court, or on a report of referees, or under the provisions of section 318, or from the judgment of a county judge. We think it is also chargeable where such judgment on appeal is taken at general term by default. But this allowance does not extend to a cause put on the calendar, and not argued; nor does it extend to an appeal from an *order*. There is no fee allowed the clerk for any services on special motions, or on an appeal from the decision of a special motion. These services are paid by the liberal compensation allowed the clerk for other services. The allowance for a trial on appeal is only applicable to suits commenced under the Code. No such fee is chargeable by the clerk for attending on motions for new trials, or on motions to set aside reports of referees, or on other arguments at general term, in old causes. These are mere motions, and not trials.

Fifty cents is allowed to the clerk for entering a judgment. Sec. 280 shows that this means entering the judgment in the judgment book (*Bentley vs. Jones*, 4 *Howard, Pr. Rep.* 355; 3 *Code R.* 37). The sum of charges for costs is to be ascertained and included in this entry, which immediately precedes, or is simultaneous with the filing of the judgment roll. The fee of fifty cents is not therefore chargeable till the perfecting of the judgment.

SUPREME COURT.

McMURRAY & THOMAS agt. GIFFORD.

An answer is bad, where it controverts no allegation of the complaint, and sets up no new matter in bar, but merely denies a conclusion of law.

An answer is bad, which merely alleges that the note sought to be recovered was obtained by fraud, and omits to set out any facts showing the existence of such fraud.

An affidavit of "a defence in the action," without swearing to merits, or advice of counsel, is insufficient under Rule 39.

The principles of pleading under the Code, as stated by HARRIS J. in *Russell vs. Clapp* (4 How. Pr. R. 347), and by SILL J. in *id.* 98, approved.

At Chambers—July 31, 1850.

WILLARD, Justice.—The complaint is upon a promissory note, alleged to have been made by the defendant, and payable to the plaintiffs, and contains all necessary allegations to establish a cause of action.

The answer is double. The first merely denies being indebted to the plaintiffs as alleged in the complaint. The second states that if the plaintiffs are the owners or holders of a promissory note named in the plaintiffs' complaint, the said note was obtained from the said defendant by fraud, and is without consideration and void.

The plaintiffs, on a notice of five days, now move for judgment, under § 247 of the Code, on the ground that the answers are frivolous.

The first answer is bad. It controverts no allegation of the complaint, and sets up no new matter in bar. The complaint states facts from which the legal conclusion is, that the defendant is indebted to the plaintiffs in the amount due on the note. The answer virtually admits all these facts, but denies the conclusion of law. It thus presents no issue of fact that can be tried. This form of answer has been repeatedly held to be bad (*Pierson vs. Cooley*, 1 Code Rep. 91; *Burr vs. Squier*, *id.* 84; *Monell's Pr.* 148).

The second answer is also bad. An answer seeking to avoid the complaint by new matter, should confess, directly or by implication, that but for the matter of avoidance contained in it, the action could be maintained (*Conger vs. Johnston*, 2 *Wend.* 96). The Code gives no countenance to a hypothetical answer. It requires a general or specific denial, or a denial according to information and belief, or of any knowledge sufficient to form a belief, of the allegation of the complaint attempted to be controverted (§ 149); or, 2d, a statement of new matter, constituting a defence; and by the 168th section, every material allegation in the complaint, not so controverted, shall, for the purpose of the action, be taken as true. It is thus treated as an implied admission of the material allegations of the complaint which it does not controvert. The defendant attempts to evade this principle of the Code.

It is bad, also, for another reason. It does not set out the *facts* which show that the note was obtained by fraud, or that it was without consideration or void. It disregards the requirement of the 2d subdivision of section 149. It alleges a conclusion of law, without averring the existence of the facts by which it is supported. It presents no fact upon which an issue could be taken, and gives the plaintiffs no intimation of the facts which he intended to prove, to establish the conclusion of law on which the defence rests. The principles of pleading under the Code are correctly stated by HARRIS J. in *Russell vs. Clapp* (4 *Howard, Pr. Rep.* 347), and by SILL J. in *Gleny vs. Hitchins* (*id.* 98). In both these cases the question arose on a demurrer. But *Piereson vs. Cooley* (1 *Code Rep.* 91) was a motion for judgment notwithstanding an answer, and which answer was like the first one in this case.

The 247th section of the Code authorises a motion for judgment when the answer is *frivolous*. The 152d section allows sham answers and defences to be stricken out on motion. The above provisions were the same under the former practice (*See Rule of Sup. Court*, 86; *Gr. Pr.* 249, 250, and cases cited, 2 ed.). If the questions presented by the answer raise a reasonable

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doubt, perhaps the answer should not be struck out on motion, but the plaintiff should be put to his demurrer. But where the answer is clearly bad, as in this case; and especially where it is drawn up in violation of the rules of the Code, and the well settled practice of the court, the plaintiffs should not be put to the expense and delay of a demurrer.

The defendant has presented an affidavit of "a defence in the action," asserting that the answers were put in in good faith, and not for delay. The affidavit is not in conformity to Rule 39, nor to the existing practice. He does not swear by advice of counsel, nor to a defence *on the merits*. Perhaps he may mean by defence, his inability to pay. No facts are stated; and as no facts are stated in the answers, an affidavit in general terms, that they are true, amounts to nothing. The affidavit to prevent striking out the answers, and for judgment, should be as full as that required by our former 91st Rule, made in pursuance of the law of 1840, p. 333, § 17. The affidavit in this case falls far short of that, and was probably intended to be evasive.

I shall therefore direct judgment for the plaintiffs, for the sum claimed in the complaint \$109.75, and interest from the fourth July last.

SUPREME COURT.

CORNING and others agt. TOOKER & LADUE.

In proceedings supplementary to execution, where a referee has certified his examination of the judgment debtor, and others who are alleged to owe him, under §294 of the Code, to the Judge; it is in the discretion of the Judge, where a proper case is presented, either to make an order under the 297th section, directing the property of the judgment debtor, whether in his own or another's hands, and also any debt due to him, to be applied towards the satisfaction of the judgment; or under the next section (298), to appoint a receiver of the property of the debtor; or, if the case require it, to do both. The only restriction upon the exercise of this discretion, is found in § 299, as applicable to certain specified cases.

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Where it appears from the examination that it is doubtful whether the person who is alleged to owe the judgment debtor, or another individual not under examination, is really indebted to him, and as a conclusion of law upon the facts uncertain; a receiver should be appointed, to enable the creditor, or the party entitled to the right, to pursue the claim by action.

The referee may, in his discretion, allow corrections or explanations to be made by any party to such examination, after it has been concluded and signed by him.

The examination is, in its nature and effect, an answer to the complaint; and, as it is taken orally, great liberality should be allowed in correcting errors and mistakes; which should be done by a supplemental statement, leaving the original unaltered.

A person examined under § 294, is, in effect, a party to the proceeding, and his examination should be conducted in the same manner as that of the judgment debtor.

The party examined is not entitled to a *cross examination*, but he may have the advice and instruction of counsel in framing his answers.

A person not a party to the proceedings upon examination, should not be allowed to appear by counsel.

At Chambers—August, 1850.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

The plaintiffs having recovered a judgment against the defendants, upon which an execution had been issued and returned unsatisfied, an order was made, requiring the defendants to appear and answer before John Newland, Esquire, a referee, pursuant to the 292d section of the Code. Another order was made, under the 294th section, requiring Francis S. Low, who was alleged to be indebted to the defendants or one of them, to appear and answer before the same referee. It appears from the examination, certified by the referee, that Low had agreed with one Van Keuren to construct for him a boat and engine, all complete, for a stipulated price. Low then made a contract with Tooker, one of the defendants, to build for him the hull of the boat, and to do the joiner work and the painting, for which he was to receive \$800. Tooker then agreed with Van Keuren himself, for whom the boat was to be built, to do the joiner work and painting, for which he was to be allowed \$100. Low testifies that the boat has been built according to contract, and delivered. He admits, that including the \$100 to be allowed to Van Keuren for the

joiner work and painting, there is due to Tooker upon his contract a balance of \$156·88. Upon the settlement between Van Keuren and Low, the \$100 was retained by the former; but, in the receipt given by the latter, it was provided that the \$100 was to be paid to Low, if he had to pay it to Tooker's creditors. Upon these facts, the plaintiffs moved for an order that the sum of \$156·88, due from Low to Tooker, be applied towards the satisfaction of their judgment. Several questions were raised in relation to the mode of conducting the examination before the referee, and the rights of the several parties upon such examination, all which are sufficiently stated in the opinion below.

F. S. EDWARDS, *for plaintiffs.*

O. MEADS, *for Van Keuren.*

HARRIS, Justice.—After the examination has been concluded, and, if taken before a referee, certified to the judge, an order may be made, if a proper case is presented, under the 297th section of the Code, directing the property of the judgment debtor, whether in his own or another's hands, and also any debt due to him to be applied towards the satisfaction of the judgment; or, under the next section, a receiver of the property of the debtor may be appointed; or, if the case require it, both may be done. Whether the one or the other, or both shall be done, rests, I think, in the sound discretion of the judge. The only restriction upon the exercise of this discretion, is found in the 299th section, which declares, that in certain specified cases, the property of the debtor, or a debt due to him, shall only be recoverable in an action by the receiver. In every other case, it must depend upon the facts as they appear before the judge, whether the property of the debtor, or a debt due to him, shall be delivered or paid directly to the creditor in satisfaction of his debt, or whether he shall receive the benefit of such property or debt through the intervention of a receiver. Ordinarily the expense of a receivership may be avoided; but there may be cases where it is more proper, if not necessary, that a receiver should be appointed. I think this is such a case. It is true, that, in respect to the \$100

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in question, Low does not in terms deny his indebtedness. He simply, and no doubt truly, states the facts as they exist; leaving the question whether or not he owes the \$100 to Tooker, as a conclusion of law to be determined from those facts. He says, in substance, that if Van Keuren owes him the \$100, he owes it to Tooker; but if such a contract was made between Tooker and Van Keuren, as entitled the latter to retain the \$100 out of the price he was to pay for building the boat, then he does not owe the \$100. It is a question upon which Van Keuren, as well as the other parties interested, has a right, in some form, to be heard. To make a summary order upon these proceedings, directing the payment of the \$100 by Low to the plaintiffs, might work injustice either to Low or Van Keuren. The rights of the parties can only be properly determined by an action. The plaintiffs are therefore entitled to an order, directing Low to pay to them the sum of \$56.88 towards the satisfaction of their debt. They are also entitled to an order appointing a receiver, for the purpose of bringing an action against Low or Van Keuren, or both, if they choose farther to pursue the \$100 in question.

Several questions were raised in the progress of the examination before the referee, of some practical importance; and upon which, the counsel for the parties have united in desiring that an opinion should be expressed.

Low was examined under the provisions of the 294th section of the Code, and this examination had been concluded and signed by him. On a subsequent day the plaintiffs' counsel being present, he appeared before the referee, and desired to make a certain explanations of the statements contained in his examination. The referee allowed him to make such explanations. In this I think he was right. Whether or not such subsequent explanations should be received, must depend upon the circumstances of the case, and is a matter very much within the discretion of the officer taking the examination. A person examined under the 294th section is, in effect, a party to the proceeding, and his examination should be conducted in the same manner as that of the judgment debtor. The object in each case is to discover the

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debtor's property. No question which does not tend to effect that object is relevant or proper. The party may refuse to answer any such irrelevant or improper question, at the peril of being adjudged in contempt, if the question should prove to have been relevant or proper. The examination is, in its nature and effect, an answer to a complaint; and, as it is taken orally, great liberality should be allowed in correcting errors and mistakes. The original statement should be left unaltered, but the party should be permitted to make the desired correction by a supplemental statement.

The party examined is not entitled to a cross examination, but he may have the advice and instruction of counsel in framing his answers. I think, therefore, the referee erred in allowing the parties to be cross-examined. The examination itself is, in fact, a cross-examination. Hence it is that leading questions are allowable. When the examination is concluded, all that the party examined has a right to do, is to add such explanatory statements as he, or his counsel, may deem necessary to prevent any misapprehension of what he has already said.

If, as Low states, Van Keuren was liable to pay the \$100 to him, if he should be compelled to pay it to the plaintiffs upon this proceeding, it was his duty to allow the counsel employed by Van Keuren to appear for him upon his examination; but Low having declined to recognize Mr. Meads as his counsel, I think he had no right to appear upon the examination as Van Keuren's counsel. Van Keuren must be regarded as a stranger to the proceedings; and his counsel, therefore, should not have been allowed to take part in the examination. If Low had unjustly refused to permit him to defend the claim made upon him in these proceedings, it might have been available, as a ground of defence, when Low should call upon him for reimbursement. Van Keuren having no right to appear before the referee, it follows, of course, that the testimony of the witness produced by him ought not to have been received.

In the view I have taken of this case, upon the merits, the errors which have occurred in the examination do not affect the

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result. But as the questions were discussed upon the hearing, and as they are questions which may very frequently arise upon the numerous examinations which are likely to occur under the existing practice, I have thought it might be useful, in compliance with the expressed wish of counsel, to examine each of the questions raised, and briefly to state the result, in connection with the decision of the case upon the merits.

SUPREME COURT.

PATRIDGE agt. FORD & NORTON.

The costs allowed to the prevailing party in a summary proceeding to recover the possession of land, are merely the fees of those officers who are required to perform the services, such as the judge, sheriff, constable, &c. Attorneys and counsel fees are not recoverable in such proceeding, against the adverse party.

Schenectady Special Term, April 1850. This was a summary proceeding to remove a tenant, instituted in 1850 before the county judge of Essex county. The landlord obtained the usual order for the removal of the tenant, and then caused his costs to be taxed before the county judge. They were taxed on notice to the adverse party, and against his objection, at twenty-nine dollars and ninety-three cents. The costs were made out and taxed according to the fee bill for attorney and counsel in the Supreme Court of 1830 (2 R. S., 632, 633), as far as the services were analogous. There, a retainer of \$3.62½ and attorney and counsel fee on motion at \$1.25 each was taxed. The motion is for a retaxation, or for such other relief as the court may see fit to grant. It was insisted on the part of the defendants, that no costs are taxable in this case, but that such costs as are allowed to the officers of the court and who are required to render the services, are recoverable in an action, under the 49th section of the act (2 R. S., 516).

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A. POND, *for the Motion.*P. POTTER, *for the Plaintiff.*

WILLARD, Justice.—The fee bill of 1830 provides compensation for services done or performed *in the several courts of law and equity* in this state by the officers thereof, or in any proceeding authorized by law. The 18th section (2 R. S., 633) and the 27th section (*id.*, 636) related to the attorney's costs in the Supreme Court and Court of Common Pleas, and contain the list of items allowable to those officers. Those sections were repealed by the law of May 14, 1840 (*L. of 1840*, p. 327, 336, §40), and a different rate of fees was prescribed. The latter act moreover, relates only to services hereafter done or performed, *in any court of law in this state, being a court of record*. It does not provide for services rendered in summary proceedings before particular officers. Those proceedings not being required to be conducted by an attorney, have never been supposed to fall within the fee bill, unless the statute which creates them has specially provided to that effect (See *Van Hovenburgh vs. Case*, 4 *Hill*, 541). The 49th section of the Revised Statutes (2 R. S., 516), allows the prevailing party costs in a summary proceeding to recover the possession of land, and provides that "he may maintain an action for the recovery thereof." This merely relates to the fees of those officers who are required to perform the services, such as the judge, sheriff, constable, &c., but does not embrace any compensation to the attorney and counsel, or to either of them. It is not necessary that these costs be taxed; though it is believed, there is no objection to their being taxed.

The taxation must be set aside, and a retaxation ordered.

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SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK agt. WILLIAM B. WRIGHT.

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The trial of a cause for the convenience of witnesses should be had in the county where the witnesses reside; even though they may be required to travel a greater distance than to the court house in an adjoining county, in attending court (*see* 1 *Hill*, 671.)

It is not a sufficient objection to the trial of a cause in the county where all the principal facts arose and a majority of the witnesses reside, that the subject matter of the cause has created much excitement and public and private discussion in the county, and that several respectable individuals in each town of the county have sworn that for such reasons they believe that it is very doubtful whether a fair and impartial trial can be had in the county. An actual experiment should be made by way of attempting to empanel a jury, or the inability to obtain a fair and unprejudiced jury, must be clearly established by showing facts and circumstances from which the court can see that a fair trial can not be had, before the place of trial will be changed.

Albany Special Term, August 1850. This was a motion to change the place of trial from Columbia to Rensselaer. The action was brought by the Attorney General in place of the former proceeding by *quo warranto*, and involves the question whether the defendant or Mr. Henry Hogeboom, was elected a Justice of the Supreme Court, in the third judicial district, at an election which took place in November 1849. Issue was joined by service of a replication on 3d August 1850. The facts to be inquired into all occurred in the county of Rensselaer.

N. HILL, Jr., *for Defendant.*

R. W. PECKHAM, *for Plaintiffs.*

PARKER, Justice.—In support of this motion, the defendant shows by affidavit, that he has 175 witnesses residing in the town of Stephentown in the county of Rensselaer, each of whom, as he expects to prove, voted for him for the office of Justice of the Supreme Court at the last election; and one other witness in that town who acted as clerk of said election. He proves that he has three witnesses residing in the town of Greenbush and two in the town of Lansingburgh in said county, and states what he expects to prove by each of them.

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The plaintiff, in resisting this motion, claims but four witnesses residing in the county of Columbia, and it is not shown what, it is expected, will be proved by either of such witnesses. But it is shown by affidavit that the distance from Stephentown to Troy is about 25 miles and to Hudson about 30 miles; and that the witnesses residing in Stephentown would only have to travel five miles farther to attend court in Columbia, than to attend court in Rensselaer county; that the road to Hudson is preferable; and several persons, residing in Stephentown, swear "that they believe the witnesses who should find it necessary to attend the trial in this cause, could as eligibly, conveniently and economically, and would as readily and willingly, attend the trial thereof at the city of Hudson as at the city of Troy." The plaintiff relies upon these facts as furnishing a ground for resisting this motion.

If this position is tenable, it is only applicable to the witnesses residing in Stephentown; and it would still leave the greater number of witnesses residing in Rensselaer, with the additional reason that all the facts in controversy occurred there.

But it is settled by authority that this position is not tenable. In *Hull vs. Hull* (1 *Hill R.* 671), a motion was made to change the venue from Allegany to Cattaraugus, on an affidavit that the defendant had fifteen witnesses in the latter county. It was shown, in opposition to the motion, that the defendant's witnesses resided nearer to the court house in Allegany than to the court house in Cattaraugus; viz: 25 miles from the former and 27 miles from the latter. But the court granted the motion, and *Bronson, J.*, said, "on a question of venue, we look to the county in which the witnesses reside, rather than the distance they will have to travel. As a general rule, the convenience of witnesses will be best consulted by having the trial in the county where they reside. That course will be less likely to disturb their social and business relations, than calling them into a foreign county."

The case cited would be an authority for removing the cause to Rensselaer, even if the distance had been nearer to Hudson than Troy. But it is shown to be five miles farther; and if the

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distance was to control, we should be obliged to come to the same conclusion. For the compensation to be paid the witnesses depends, in part, upon the distance travelled; and the party would be subjected to an increased expense, by retaining the venue in Columbia.

But I regard the case cited as being placed upon the true ground, and it is, of course, decisive on this point.

It appears, then, that there is a very large number of witnesses residing in the county of Rensselaer, whose convenience will be best promoted by trying the cause there; and that all the facts to be enquired into occurred in that county. That is, therefore, emphatically the proper place for trial, unless the second point made on the part of the plaintiff is well taken, which is, that a fair trial can not be had there.

The plaintiff produces affidavits made by several persons residing in each town of the county of Rensselaer, stating in substance, that the matters in controversy have been the subject of general conversation and comment throughout the county; that feelings and prejudices exist, and that they believe the electors of the county have, generally and almost universally, formed and expressed an opinion on the merits, which they would not be likely to change. They also show that such matters have been the subject of newspaper discussion in said county, and that there has been and is much excitement on the subject; and they conclude, by stating that for these and other reasons, they believe that it is very doubtful whether a fair and impartial trial can be had in said county of Rensselaer.

It will be necessary to examine the decisions bearing upon this point, for the purpose of ascertaining whether the facts shown and opinions thus expressed, furnish a sufficient reason for refusing this motion.

Bowman vs. Ely, et. al. (2 *Wend. R.*, 250), was an action brought for the publication of a handbill, alleged to be libellous, issued immediately before an election, by the defendants, styling themselves the anti-masonic central committee. The defendants moved to change the venue from Oneida to Monroe, on

an affidavit showing twenty witnesses. The motion was opposed on the affidavit of several disinterested and highly respectable individuals, in which they stated that from their knowledge of the excitement then existing on the subject of masonry, they believed the plaintiff could not have a fair and impartial trial before a jury of Monroe county. But the court granted the motion, and said they would not, on any speculative opinion formed by individuals, however respectable, interfere with the ordinary course and practice of the court in the administration of justice. MARCY, J., said, "pervading as may be the excitement referred to, the court repose confidence in the intelligence and integrity of the freeholders of Monroe. Should it unfortunately happen that the apprehension of the plaintiff is realized, he will not be remediless, as it will then be in sufficient time to interpose the strong arm of the law, to cause the course of justice to flow unpolluted by passion or prejudice."

The same rule was followed in *Messenger vs. Holmes* (12 *Wend. R.*, 203), where a motion was made to change the venue, on the ground of *excitement*, after two trials of the cause, in neither of which the jury were able to agree. The court held that the case came within the principle stated in *Bowman vs. Ely*, and granted the motion. SAVAGE, Ch. J., said, "when it is found by actual experiment, that a fair trial, or, as in this case, no trial can be had in the county where the venue is laid, the motion, on the ground relied on in this case will be granted: but otherwise not."

But it is claimed, on the part of the plaintiff, that the rule thus laid down in the cases above referred to has been changed by the case of *The People vs. Webb* (1 *Hill*, 179), where, without an attempt to try the cause, the venue was changed from Otsego to Montgomery, on motion of the district attorney, on the ground of excitement and improper influence in the former county. The rule was certainly so far relaxed, in the last cited case, as to hold that an *actual experiment*, by way of trying the cause, or attempting to empanel a jury, was not the only evidence the court would receive, as proof that a fair and impartial trial could not

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be had, in the county where the venue was laid. But the motion was granted, principally upon the ground that it appeared that the defendant had improperly attempted to influence the jurors, drawn at a previous Court of Oyer and Terminer in Otsego county, by sending to them newspapers, containing articles tending to prejudice their minds against the prosecutor, in respect to the trial; and that he had also influenced and misled the public mind, by circulating libellous articles throughout the county, among those who were not subscribers for his paper.

In the latter case of *The People vs. Bodine* (7 *Hill*, 181), an application was made to change the venue from Richmond county to New York, which was refused, notwithstanding there had been one trial in Richmond in which the jury did not agree. Ch. J. NELSON there stated that he had examined the subject with a view to endeavor to settle some rule, by which cases of that kind might thereafter be governed. He held that it was not enough for persons to state their belief that a fair and impartial trial could not be had in the county, but that the facts and circumstances forming the grounds of such belief, must be stated, so that the court may judge for itself whether or not the allegation is well founded; and that the inability to obtain a fair and unprejudiced jury must be clearly established. To this extent, the rule is consistent with all the cases above examined, and also with other authorities, which I have not deemed it necessary particularly to refer to (*Rex vs. Harris*, 3 *Burr*. 1330; 1 *Black. Rep.* 378, *S. C.*; 1 *Chit. Cr. Law*, 200; *Roscoe Crim. Ev.* 236; *The People vs. Vermilyea*, 7 *Cowen*, 137).

In *The People vs. Bodine*, it was said that the rule there recognized was founded in good sense, and that its practical operation would prove an essential check upon the facility with which motions may be got up, from a too ready apprehension of undue prejudice.

In applying this rule to the case now before me, I am at a loss to see how it will exclude the cause from the county of Rensselaer. The inability to obtain a fair and unprejudiced jury must be

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clearly established. Conceding that actual experiment is not the only admissible proof, yet I find no other satisfactory evidence here presented. There are no facts and circumstances shown which, in my judgment, warrant such a conclusion; and the extent to which the witnesses who make the affidavits go, on this point, is only to say that they believe it is very doubtful, whether a fair and impartial trial can be had in the county of Rensselaer. This is clearly insufficient within all the cases. Nor do I think the witnesses would have been warranted on the facts stated by them in expressing their opinions more strongly. I have never found any great difficulty in obtaining fair and impartial juries, even in capital cases and other trials of great public interest in the same counties where the offences were committed and where there had been much newspaper discussion and great public excitement. And I have no doubt a jury entirely free from prejudice, and satisfactory to the parties, may be readily empannelled in this cause in the county of Rensselaer.

This case is entirely unlike that of *The People vs. Webb*, which is the only one cited, or that I have found, in which a change of venue was granted on the ground of excitement, without a previous attempt to empanel a jury. Here has been no undue or improper influence exerted on either side. Here it does not appear that one, more than the other of the parties, is likely to be benefitted or injured by any possible prejudice or bias. Both stand upon equal ground; and the high character of the contestants, and the nature of the controversy forbid the supposition that either of them would, if it was in his power, avail himself of any preconceived impressions existing in the community, or permit any considerations of personal advantage, to interfere with a fair and candid examination of the questions of fact to be tried.

I find nothing in this case to warrant a departure from the well settled practice of the court. The cause should be tried where the controversy arose, and where nearly all the witnesses reside.

Motion granted.

Dorr et al. agt. Noxon.

SUPREME COURT.

DORR et al., agst. NOXON.

If it appears, on examination of witnesses on a proceeding supplementary to an execution, under the first branch of § 292 of the Code, that a third person, not a party to the proceeding, is in possession of property liable to an execution belonging to the judgment debtor, and is colluding with the debtor to enable him to defraud his creditors, the proper remedy of the judgment creditor is to levy on the goods and sell them under his execution; or to institute an action, in the nature of a creditor's bill, against the judgment debtor and his fraudulent assignee.

If a receiver can be appointed, in such case, he can only be appointed on notice to the judgment debtor. (*See Corning agt. Toker, ante page.*)

A referee appointed to report the *facts*, is not at liberty to report the *evidence* at large.

At Chambers—Saratoga Springs, May, 1850.

WILLARD, Justice.—On the third October 1848, the plaintiffs obtained a judgment in this Court against the defendant for \$223.30, which was docketed in this county; and an execution was issued on said judgment to the sheriff of this county, where the defendant resides, and was returned *nulla bona* in February last. The plaintiffs thereupon applied to me, under the first branch of § 292 of the Code, for an order requiring the defendant to appear and answer, concerning his property, before a referee appointed for that purpose, and which referee was required to report the facts. The referee took the examination of several witnesses as to the affairs of the judgment debtor, and has reported the evidence at large. He did not examine the defendant at all. The return of the referee has been submitted to me without argument. I do not know for what order the plaintiffs intend to apply.

As the referee has not complied with the order under which he was appointed, and has reported the *evidence* instead of the *facts*, I might well decline to examine the matter further, and refer it back to him to complete his report. But I am inclined to think a few remarks may save the trouble and expense of a further

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reference. The testimony tends to show that Noxon, the judgment debtor, is in truth the owner of the store of goods in his possession; and that Ogden, who claims to be the owner, has colluded with him for the purpose of defrauding the creditors of Noxon. If that be so, the plaintiffs should either direct the sheriff, after indemnifying him, to levy upon and sell the goods on the execution against Noxon; or they should commence a suit, in the nature of a creditor's bill, against Noxon and Ogden. Ogden is not a party to this proceeding.

It is possible a receiver might be appointed under §§ 298, 244. But this can not be done except upon notice to the defendant, who has a right to be heard on the question (*Kemp v. Harding*, 4 *H. Pr. Rep.* 178).

I will decline making any order at present, but without prejudice to the plaintiffs' rights.

5 How. 30-DISAPPROVED, 1 Daly 452. See 6 ———
How. 413.

SUPREME COURT.

KING agt. STAFFORD & MAXWELL.

The decision of a motion, granting judgment on the ground of the frivolousness of the demurrer under § 247 of the Code, and allowing the defendant time to answer, is not an order, but a *judgment* (*See Bentley agt. Jones*, 4 *How. Pr. R.* 335). An appeal from such a decision must therefore be taken as an appeal from a judgment—not from an order.

In an action upon a promissory note, where judgment is given for the plaintiff on the ground of the frivolousness of the defendant's demurrer, the defendant is entitled to *notice of assessment of damages*, before the clerk. The provisions of the Revised Statutes (2 *R. S.*, 356, § 1, 3 and 4), in relation to assessment of damages in such a case, are not repealed and are not necessarily inconsistent with the Code. If not, they remain in force (*Code*, § 468.)

Schenectady Special Term, July 1850. The defendants demurred to the complaint. The plaintiff applied to Justice WILLARD, out of court, for judgment on the ground of the frivolousness of the demurrer, under section 247 of the Code. The Justice granted the motion, but gave the defendants ten days to answer the complaint. The order of the Justice granting the motion,

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gave no specific direction that judgment be entered. The defendants regarding the order granting the motion, as an appealable order, appealed to the general term under § 349 of the Code, and gave the security required by § 334 of the Code, except, omitting therein, an undertaking to pay damages. The plaintiff regarding the appeal as a nullity, after the lapse of ten days filed with the clerk an affidavit stating the order made by Justice WILLARD, that more than ten days had elapsed and no answer had been put in by the defendants, &c., and caused a final judgment to be entered for the sum claimed in the complaint—notice of the adjustment of the costs by the clerk was served on the defendant's attorney—the clerk assessed the damages on the note on which the action was founded. But no notice of assessment of damages was served on the attorney of the defendants. The defendants now move to set aside the judgment for irregularity.

W. A. BEACH, *for Defendants.*

CHARLES S. LESTER, *for Plaintiff.*

PAIGE, Justice.—The first question raised on the motion, whether the decision of Judge WILLARD granting the motion for judgment on the ground of the frivolousness of the demurrer, was an appealable order under § 349 of the Code, has been considered and passed upon by the Supreme Court of the third district. That court decided that the decision of a demurrer was not an order, but a judgment and that an appeal from it as an order could not be made (4 *How. Pr. R.* 335; *Bentley vs. Jones*, per PARKER, Justice). In that case Justice PARKER held that the argument of a demurrer was a trial. And he took the distinction, that an order was the decision of a motion, and a judgment the decision of a trial (*Code, sections* 400, 245, 252, 255, 251). A like decision was made at the last general term of the Supreme Court of this district, on a motion to dismiss the appeal brought in this suit. The court on that motion decided that the decision of Justice WILLARD was not an order but a judgment, and dismissed the appeal. The decision of Justice WILLARD was regarded as the

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final action of the court. It was the determination of an issue of law, and was in effect a judgment. The application for judgment was a summary trial of an issue of law. It was also decided on the motion to dismiss the appeal in this action, that the leave given to put in an answer did not make the decision an order. The decision of Justice WILLARD does not come within the definition of an order (*Code*, § 400). For it was in effect a direction to enter a judgment, and would necessarily be included in the judgment. The defendants therefore, to obtain a review of the decision of Justice WILLARD, must appeal from the judgment to be entered on such decision.

The other question raised on this motion, is, whether the plaintiff should have served a notice of the assessment of damages on the defendants' attorney.

The Revised Statutes (2 R. S. 356, § 1, 3, 4), provide, that if in an action on a promissory note, interlocutory judgment be rendered for the plaintiff, upon demurrer, the court shall direct the clerk to assess the damages; and if the defendant has appeared in the cause, notice of assessment must be served upon his attorney (*Gra. Pr.* 290). The first subdivision of section 246 of the Code declares, in cases of a failure of the defendant to answer the complaint, that, if the complaint be not sworn to, and the action is on an instrument for the payment of money only, the clerk must assess the amount due the plaintiff, and enter judgment for the sum so assessed; and if the defendant has given notice of appearance, he shall be entitled to five days notice of the assessment. Section 269 of the Code declares, that, on a judgment for the plaintiff upon an issue of law, the plaintiff may proceed in the same manner prescribed by § 246 in cases where the summons, or summons and complaint are personally served and the complaint sworn to, upon the failure of the defendant to answer. The manner prescribed in such cases by § 246, is, for the plaintiff to file with the clerk, proof of the personal service of the summons and complaint on the defendant and that no answer has been received, and the clerk then to enter judgment for the amount mentioned in the summons. This, the plaintiff did not

do; and it certainly would seem to be a very idle ceremony, to file with the clerk proof of the personal service of the summons and complaint in a suit where the defendant has appeared and put in a demurrer; although this seems to be required by section 269, in all cases where a judgment is given for the plaintiff on an issue of law. An assessment of damages by the clerk in such cases, would be a proceeding decidedly more proper. In many cases, as where there are endorsements on the note, an assessment by the clerk would be necessary to prevent injustice to the defendant. I do not think that the provisions of the Revised Statutes in relation to assessment of damages in an action on a promissory note, where judgment is given for the plaintiff on demurrer, are necessarily inconsistent with the Code. If they are not, they remain in force (*Code*, § 468). Section 247 of the Code, which declares that where an application for judgment on the ground of the frivolousness of a demurrer, is granted, judgment may be given accordingly, does not necessarily require judgment to be immediately entered by the clerk on the decision of the judge for the sum mentioned in the complaint, without any assessment of damages, or proof as to the amount due to the plaintiff. This would work gross injustice, especially in cases where the action was in tort, or on contract for unliquidated damages. The idea that judgment is to be immediately entered in such cases for the amount claimed, is negated by § 269. By that section, if judgment is for the defendant upon an issue of law, a reference is to be ordered, or writ of inquiry issued, wherever the taking of an account or proof of any fact is necessary to enable the court to complete the judgment. A reference or writ of inquiry is equally necessary in like cases, where judgment is for the plaintiff on an issue of law, although no provision is expressly made for either in the code. Section 269, adopting the meaning conveyed by a literal reading, requires only, where judgment is for the plaintiff on an issue of law, that proof of personal service of the summons and complaint on the defendant and that no answer has been received, should be filed with the clerk before the entry of judgment. And this would seem to be all that is required by that

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section, in any case, where judgment is for the plaintiff, although the action be in tort or on contract for unliquidated damages, and although the complaint is not sworn to. This is wholly incongruous with the proceedings to obtain judgment on a failure of the defendant to answer (*Code*, § 246). Where a demurrer of the defendant to the complaint is overruled, there is a failure to answer, and the like proceedings ought to be had as in cases where the defendant neglects to put in either an answer or demurrer to the complaint. In the present case the complaint is not sworn to. And in such a case, the Code, where the defendant fails to answer, requires an assessment by the clerk before judgment can be entered (*Code*, § 246). According to the old practice, the proceedings in case of judgment for the plaintiff upon demurrer, were the same as in case of judgment by default (*Gra. Pr.* 261, 285, 2d ed). It can not be in accordance with the general intent of the Code, or the intention of the legislature, that in all cases of judgment for the plaintiff on demurrer, judgment should at once be entered by the clerk for the amount mentioned in the complaint, without any proof being taken by the court or an assessment by the clerk or a jury, or without a reference to enable the court to complete the judgment.

I shall therefore hold that, as in this case, the defendants have appeared in the action, their attorney was entitled to notice of the assessment of damages, or of the amount due the plaintiff, by the clerk. And as such notice was not given by the plaintiff, the judgment was irregularly entered. The plaintiff did not even proceed as required by section 269. He did not file with the clerk proof of the personal service of the summons and complaint, before the entry of the judgment. The judgment entered by the plaintiff in this action must therefore be set aside for irregularity. But as the questions arising under the Code, involved in the motion, are new and doubtful, I shall grant the motion of the defendants, without costs to either party.

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Dillon agt. Horn and Moring.

SUPREME COURT.

DILLON agt. HORN & MORING.

A general creditor of insolvent general partners, may, on complaint and answer, where the debt is not denied, have an injunction to protect the partnership property and assets, and a receiver appointed.

It seems that the principle asserted by the Chancellor in the case of *Innes vs. Lansing*, 7 *Paige*, 583, sustaining a bill and injunction upon the application of a creditor against insolvent *limited* partners, on the ground that the partnership effects were a trust fund for the benefit of all the creditors, should apply equally to an insolvent *general* partnership.

New York Special Term—January, 1850.

The complaint alleged that defendants had been partners; had quarrelled, and dissolved the partnership; and that the effects of the firm had come into the hands of one of the firm, who was wasting them, and appropriating them to his own use. Plaintiff was a general creditor of the firm, but having no judgment against them, which, however, he sought in this suit.

There were other matters set out as to a joint adventure of plaintiff and defendants, which it is unnecessary to state.

Upon the complaint and answer, a motion was made to dissolve a preliminary injunction, and a counter motion to appoint a receiver of the partnership assets.

EDMONDS, Justice.—For the purposes of this motion, I must consider Horn and Moring as partners. The allegation of a partnership is, it is true, sufficiently denied, so far as Horn is concerned; but the facts adduced to show the existence of a connexion, are not sufficiently explained or done away with, to warrant me in the conclusion that, as to creditors, they were not partners.

Regarding them then as partners, the question arises, whether, at the suit of a general creditor, a receiver of the effects of the firm can be appointed?

The firm is bankrupt: not only have its notes been suffered to

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lie over, but Horn avows that it will be unable to pay all its debts. A large amount is outstanding unpaid, and a large amount of property and assets yet remain to be disposed of. The members of the firm have severed their intercourse, and one of them has taken possession of all the effects, and ejected the other from all participation in its affairs. The member thus ejected, after obtaining an injunction against his copartner, and given notice of a motion for a receiver, has settled his suit, and withdrawn his application for a receiver. And now unless a receivership can be obtained on the application of a general creditor, these insolvent partners will have the entire management and winding up of the affairs of the concern. Nay more, the defendant Horn claiming that there was no partnership, and that all the assets belong to him individually, and of course may be disposed of by him in satisfaction of his individual debts, and having ejected the other partner from all control over or possession in the effects of the firm, may appropriate the whole of them to the satisfaction of his individual debts, to the exclusion of claims of the nature of the plaintiff's.

On the dissolution of a partnership, each partner has a lien on the partnership effects, as well for his indemnity as for his share of the surplus; but general creditors have no lien for their debts: their equity is that of the partners operating to the payment of the partnership debts.

Such being the general principle, upon what ground can this complaint and the injunction be sustained, so far as it relates to the debt owing to this plaintiff?

In *Innes vs. Lansing*, 7 Paige, 583, the Chancellor sustained the bill of a general creditor under similar circumstances, and refused to dissolve an injunction restraining the partners from receiving or disposing of the effects of the firm. He did this on the avowed ground that it was a special partnership; and that under the statute, the property of the partnership was a trust fund for the benefit of all the creditors.

It is difficult to see how it is any more a trust fund for the benefit of creditors, in the case of a special partnership, than in case of a general one.

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In the latter case, no creditor of one of the partners can collect his debt out of the partnership property, until the partnership debts are paid; nor can a partner assert his claim to a surplus, until that event; so that partnership creditors have a prior claim to every body, and the property may well be said to be held in trust for them.

The fact that the members of an insolvent special partnership are forbidden by the statute to give any preferences, which is alluded to by the Chancellor, can make no difference, because a vigilant creditor is nowhere forbidden to obtain such preference by compulsory proceedings; and I am at a loss to see how the partnership effects are any more a trust fund in the one case than in the other, or in what respect new rights are conferred by the statute of limited partnerships.

I suppose that the real ground of the decision was the insolvency of the partnership, and the danger there was, from that cause, that the trust fund which exists equally in both cases, might be diverted from its legitimate purposes. The only difference between the cases, which the statute makes, is, that in case of a limited partnership, no assignment or disposition of the effects, with a view to a preference, can be made. That difference, however, was evidently not the ground on which the Chancellor entertained jurisdiction in that case; for there is no suggestion that the partners were aiming or intending to make such assignment or disposition: the injunction was not confined to those limits, but restrained the defendants from any receipt or disposition of the effects; and the final decision was retaining the injunction generally, and not merely as it forbid preferences, and allowing a receiver.

The decision was then, as I understand it, on the broad ground that the partnership effects were a trust fund for the benefit of creditors, and that the partners were insolvent. Both those elements are found in the case now before me; and the question arises whether they are sufficient, on the authority of that case, to sustain this complaint, and the application now made for a receiver.

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The insolvency of the partnership and of the several partners, which is admitted in this case, is undoubtedly an important ingredient; for it is well settled, that in a dissolution, where there is no insolvency, the priority of the creditors can be worked out only through the equity of the partners; and an injunction and receiver will not be granted, except on the application of one of the partners, and then only when they do not agree among themselves. But where there is such insolvency, can those who have a prior right over all others, to the trust fund, assert that right before obtaining judgment and execution?

There is another element in this case, which must not be overlooked; and that is, that the indebtedness to this plaintiff is conceded by the defendants, and a judgment is not necessary to establish the right of the plaintiff as a creditor. Must he then obtain a lien by execution, before he can assert his admitted right?

As partnership property is acquired by partnership debts, it ought first to be applied to the discharge of them. Those funds ought first to be liable on which the credit was given; so that when the property of three partners becomes the property of two of them, it is never divisible till the partnership debts are satisfied; and joint creditors have a primary claim on the joint fund of an insolvent partnership, prior to separate creditors. How are these rights to be asserted, except in the manner indicated by the application now under consideration?

If the plaintiff must wait until he can obtain judgment on a claim which is undisputed, in the mean time these insolvent partners may waste a trust fund (to which he and his cocreditors have a prior claim), by expending it in satisfaction of their separate debts, and his right be utterly unavailing, and his priority a mere dead letter.

But this could always have been said, before the case of *Innes vs. Lansing*, of an insolvent partnership, whether general or limited; and yet it has never, until that case, that I can learn, been held to be good ground for the interference of the Court of Chancery before judgment and execution. In that case, however, it is held otherwise, and upon grounds which I confess appear to me to be well taken.

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My embarrassment is, how to avoid that decision, and the application of its principle to the case before me.

It may be said that the Chancellor did not intend that his ruling should extend beyond a limited partnership. That may very well have been his intention; but I repeat that I can not see any difference in the rights of creditors in a general or a limited partnership, nor any reason why the principle which has been laid down as to the latter does not apply with equal force to all cases of insolvent partnerships, where the indebtedness of the moving creditor is conceded.

It seems to me that to hold that this action will not lie, I must overturn that decision; and that I am not disposed to do, though I agree with the Chancellor in the opinion that it is somewhat of an enlargement of the prior jurisdiction of the court. But I am not alarmed at that consideration in this case, and for this reason: Under the English system of jurisprudence, from which we have borrowed our equitable jurisdiction, there is a remedy for a case like this under their bankrupt laws. But as we have no bankrupt law; unless we retain the principle of *Innes vs. Lansing*, and extend its operation, we shall have no adequate means of restraining insolvent partners from wasting what is most justly held to be a trust fund, or of enforcing the clearly acknowledged right in partnership creditors to priority of payment over all the world. Therefore it is that I hesitate to overrule that case, or to circumscribe the application of its principle; preferring to submit that question to the court in bank, where it may go on appeal if I retain the injunction, and order a receiver to be appointed.

These remarks apply only to the question of the general debt of this plaintiff, about which alone I have my doubts. So far as the joint adventure of these parties, which is set out in the complaint and admitted by the defendants, is concerned, there is no difficulty: the injunction *pro tanto* must be retained, and a receiver be appointed of course. And in order to take the other question before the general term, I shall retain the injunction *in toto*, and order a receiver to be appointed.

The costs of these motions to abide the event.

COURT OF APPEALS.

Decisions September Term, 1848, at the Capitol in the city of Albany.

SEABURY BREWSTER, plaintiff in error, vs. GARBIT H. STRIKER, JR., defendant in error. *Judgment affirmed.* DANIEL LORD and GEORGE WOOD for plaintiff in error; EDWARD SANDFORD and CHARLES O'CONOR for defendant in error.

This was a case involving the construction of the will of the late John Hopper of the city of New York, deceased. The questions were, what estate did the grand children take under the will in the real estate of the testator? and what interest therein or power over the same was vested thereby in the executors? *Reported, 2 Comstock, 19.*

SEABURY BREWSTER, plaintiff in error, vs. DAVID THOMAS and GARBIT H. STRIKER, JR., defendants in error. *Judgment affirmed.*

This cause was submitted to abide the event of the above. The same questions being involved.

THE PRESIDENT, &C. OF THE CAYUGA COUNTY BANK, plaintiffs in error, vs. ETHAN A. WARDEN and FRANKLIN L. GRISWOLD, defendants in error. *Judgment reversed with venire de novo; costs to abide the event.* JOHN PORTER for plaintiffs in error; WARREN T. WORDEN for defendants in error.

The question in this case was, whether the demand and notice of protest was sufficient to charge the defendants in error as endorsers of a promissory note. *Reported, 1 Comstock, 413*

Bander agt. Bander.

SUPREME COURT.

BANDER agt. BANDER.

To recover *annual* interest upon the *whole principal sum*, payable in instalments; appropriate words must be used, in the note or obligation, clearly to express such intention.

Thus, where a promissory note was made payable as follows: "For value received I promise to pay M. Bander or bearer the sum of \$1000, payable in ten annual instalments with use, the first payment to become due on the first day of June, 1848," *held*, that the interest was not payable annually on the whole principal sum, but only on the several instalments as they respectively fell due.

Montgomery Circuit, December, 1849. Trial by the Court.
This suit was brought on a promissory note in the words following: "For value received I promise to pay M. Bander or bearer the sum of \$1000, payable in ten annual instalments, with use, the first payment to become due on the first day of June 1848."
March 6, 1847. DANIEL BANDER."

YOST & LOBDELL, *for Plaintiff*L. FORD, *for Defendant.*

PAIGE, Justice.—The only question presented for decision, in this case, is, whether by the terms of the note on which the suit is brought, interest is payable annually on the whole principal sum or only on the respective instalments at the respective times they become due.

A promissory note is, like any other written contract, to be construed in accordance with the intention of the parties as declared by the express words of the note, or as it is deducible by clear and manifest implication from its terms. The force and effect of the note must be determined by its terms and not by proof *aliunde*. And when the operation of a contract is clearly settled by the general principles of law, the parties must be deemed to have entered into the contract in reference to such principles (*Thompson vs. Ketchum*, 8 *John.* 189; 2 *Cow. & Hill's Notes*, 1460). There is no general principle of law

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which requires the interest on notes, bonds, or other written contracts for the payment of money, to be paid annually. Whether the interest is to be paid semi-annually, annually, biennially, or at any other times, must depend altogether upon the agreement of the parties as expressed in the contract. Interest is a mere incident or accessory to the principal debt. It is not a part of the debt. And where there is no express contract to pay interest it can only be recovered as damages for the non-payment of the principal when it becomes due (13 *Wend.* 640-1—per SAVAGE, Ch. J.; 15 *Wend.* 80, In Error—Per CHANCELLOR). In all cases where there is no express agreement to pay interest, if the creditor accepts the amount agreed to be paid in full satisfaction of the principal, without requiring payment of the interest from the time the principal became due, no action will lie to recover such interest (13 *Wend.* 641; 15 *Wend.* 80; 3 *John.* 229; 5 *John.* 268; 3 *Cow.* 87). So where there is no express contract to pay interest independently of the principal, if the demand for the principal is barred the accessory falls along with it (Hollis vs. Paline, 2 *Bing. N. C.* 713; Tindal, C. J.). And if a party pays the principal of a debt barred by the statute of limitations, such payment does not revive the claim for interest thereon (4 *Bing.* 315). On contracts for the payment of money, which contain no express agreement for the payment of interest, interest is only recoverable from the time the principal debt falls due (7 *Wend.* 109; *Chit. on Bills*, 678; 15 *Wend.* 310).

And if the contract contains an agreement for the payment of interest but is silent as to the time when it is to be paid, the interest is not payable until the principal debt becomes due. This is undeniable upon principle, and is apparent from the cases (2 *Mass.* 568; 3 *Mass.* 221; 1 *Bouv. L. Dic.* 700, *tit. Int.*; 4 *Esp.* 147; Blake vs. Lawrence; Catlin vs. Lyman, 16 *Vern.* 45). There is nothing in Blake vs. Lawrence which countenances the idea, that interest upon a note like the one in this case, is payable annually on the whole principal. In that case the note was payable by instalments of ten pounds every three months, and in default of payment of any instalment the whole was to be payable immediately. Lord Ellenborough held, that as on default of payment

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of any instalment, the whole amount of the note became due, there was no severance as to time, with respect to the debts becoming payable, and as by the first default the whole became one debt, interest became payable from that time.

In this case, the interest is not by the terms of the note made payable on the whole principal sum annually. If the words payable "in ten annual instalments" had been omitted and the words "ten years," or words expressing any other period of time had been substituted, there would have been no ground for insisting that the interest on the whole principal sum of the note was payable annually. In that case the interest would not have been payable until the principal fell due. If the parties had intended that the interest on the whole of the principal debt should be paid annually, they ought to have expressed such intention by the use of appropriate words. If the parties had inserted after the word "use" the words "on the whole principal sum, to be paid annually," such intention would have been clearly manifested. I think that the words "with use," which convey the same meaning as "with interest" refer to the words "payable in ten annual instalments," the last antecedent; and that the true interpretation of the note is, that interest was to be payable on the several instalments as they respectively became due, and not annually on the whole principal sum remaining unpaid. If the words "with use" referred to the principal sum, a different construction could not be given to the note, as they are not followed by appropriate words declaring that the interest should be paid annually; or by words from which the intention of the parties, that the interest should be so paid, could be clearly inferred. The principle that the interest on a promissory note, payable with interest, is not payable until the principal becomes due, where the note is silent as to the time when the interest is to be paid, must control the construction of the note in this case. The note in question contains no words declaring when the interest shall be paid, and as there is no rule of law which requires interest to be paid annually where the parties have omitted to declare when it shall be paid; I must decide that the interest on the note is not

Esmond agt. Van Benschoten.

payable annually on the whole principal sum; but only on the several instalments as they respectively fall due. If this construction is not in conformity with the actual agreement of the parties which was made and intended to be carried into effect when the note was given, the remedy of the plaintiff is by an application to the equitable jurisdiction of the Supreme Court to reform the note, so as to make it correspond with the agreement which was actually made in relation to the interest (15 *Wend.* 82).

Judgment must be entered in favor of the plaintiff for the amount remaining unpaid of the instalments of the note which have already become due, with interest on the same up to this day.

SUPREME COURT.

ESMOND agt. VAN BENSCHOTEN.

By noticing a cause for trial a party waives the right of moving subsequently to strike out redundant matter from his adversary's pleading, under § 160 of the Code.

Saratoga Special Term, June 1850.

WILLARD, Justice.—A motion to strike out irrelevant or redundant matter, from a pleading, under § 160 of the Code, answers in place of an exception for impertinence under the former chancery practice. Although the distinction between law and equity has been abolished, still it will rarely happen, except in those causes of action which were formerly of equitable cognizance, that redundant or impertinent matter will be inserted. The objection for *insufficiency* will generally be taken by demurrer; for *redundancy*, a demurrer will not in general afford an appropriate remedy, and resort must be had to a motion.

It is urged that the defendant having noticed the cause for trial after receiving the reply, has waived his right to move to strike out a part of the pleading. The 43d rule requires the motion to be made before demurring or answering the pleading,

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and within twenty days from the service of the pleading. This motion was made within the twenty days but not until after both parties had noticed the cause for trial. By noticing the cause for trial, each party admits that his adversary's pleading is sufficient to raise an issue either of law or fact. He waives the right of moving subsequently to strike out redundant matter.

But aside from this and other formal objections, I think the motion should be denied on the merits. It was competent for the parties to agree by parol upon a time and place for the delivery of the writings and completing the contract. This is not contrary to any thing set up in the original contract. The original contract was silent on that subject. In such case I understand that it is competent for the parties to agree by parol on a place of performance (*Franchet vs. Leash*, 5 *Cow.* 506). The motion must be denied with five dollars costs.

SUPREME COURT.

EVERTSON agt. THOMAS.

The facts require to be shown to entitle a creditor to an order for publication, in place of personal service, against a non resident defendant, should be stated positively and not on information and belief.

An order resting on such insufficient proof will be set aside on motion.

Albany Special Term, August 1850. Motion to set aside an order for publication against a non resident defendant, made by a justice of this court at chambers, under § 135, *sub.* 3, of the Code, on the ground that the affidavit on which it was made was defective in not proving positively that the defendant had property in this state. That part of the affidavit in question was as follows: "That the said John Thomas has property within the state of New York *as this deponent has been informed and believes*, that he the said John Thomas is, *as this deponent has been informed and believes*, interested and has an interest in real estate in the county of Albany and in other counties in said state of New York."

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J. K. PORTER, *for Defendant*H. C. VAN VORST, *for Plaintiff*.

PARKER, Justice.—The affidavit is defective in not showing that the defendant has property within the state of New York. It is not enough to state this on information and belief. That is no proof of the fact. A person may give such testimony who has no personal knowledge on the subject. Mere hearsay and belief founded on it are not evidence. In *ex parte Haynes* (18 *Wend.* 611), an attachment had been issued on an affidavit in which the witnesses stated, that *they were informed and believed* that the debtor was a non resident, but the Supreme Court held the affidavit insufficient and set aside the attachment. (See also *Smith vs. Luce*, 14 *Wend.* 637; *Ex parte Robinson*, 21 *Wend.* 672; *Kingsland vs. Cowman*, 5 *Hill*, 611. In *re Bliss*, 7 *Hill*, 187; *Thatcher vs. Purcell*, 6 *Wheaton*, 119; *Williamson vs. Doe*, 7 *Black. f R.* 12; In *re Faulkner*, 4 *Hill*, 598; *Brisbane vs. Peabody*, 3 *How. Pr. R.* 109).

It will appear by these cases, how careful the courts have been, to see that the statute is strictly complied with, in proceedings which subject property to seizure and sale, without a personal service of process on the owner. The duty to protect against injustice is certainly none the less obligatory under the Code, which authorizes the recovery of judgment in so many cases on a mere publication of notice, substituted in place of personal service.

The practitioner will find it necessary to be exceedingly careful, that the affidavits on which he proceeds are in conformity to the requirements of the statute, if he will secure a valid judgment.

The motion must be granted.

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SUPREME COURT.

PEOPLE ex rel. CAHOON & KELSEY, agt. EDWIN DODGE, County
Judge of the County of St. Lawrence.

Where a cause which had been taken up by appeal from a Justices' Court to the County Court before the Code, was tried after the Code by the county judge, without a jury, by consent of the parties; who made his decision therein, but was accidentally prevented from filing it until after the expiration of twenty days; *it was held* that he had power to do so after that period; and that, as filing the decision (or depositing it with the clerk) after it was completed, was a mere ministerial act; a mandamus would issue to compel him to do so.

The statute prescribing the time for making and filing a decision on a trial of an issue of fact by the court is directory.

St. Lawrence Special Term, Feb. 1850. C. G. MYERS moved for an alternative mandamus to compel the county judge to file his decision in the case of Cahoon & Kelsey v. Northam. It appeared by the moving affidavits that the cause came to the County Court by appeal from a justice's judgment, and by consent of parties, was tried by the judge of that court without a jury. The appeal was brought in 1847. The affidavit also stated, upon information and belief, that the judge had decided the case.

Myers said that he understood Judge Dodge had made his decision in writing, but was accidentally prevented from filing it until twenty days after the term of the court at which the cause was tried, and had doubts as to his power to file it after that period.

B. PERKINS submitted that the county judge had no jurisdiction of the matter, or power to make and file his decision after the twenty days had expired (*Code*, § 267). That even if a justice of the Supreme Court could do so, the County Court was now one of special and limited jurisdiction, and that the practice prescribed by the statute must be followed to give and retain jurisdiction. He also submitted that a mandamus would not lie to compel a judge to act in such cases.

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HAND, Justice.—A mandamus is the proper remedy to compel inferior tribunals to act, though not to direct them how to act where they have discretion (*Judges of Oneida Com. Pleas vs. The People*, 18 *Wend.*, 92).

Where a question of fact is tried by the court, "its decision shall be given in writing, and filed with the clerk, within twenty days after the court at which the trial took place" (*Code*, § 267). In cases tried at the circuit, clearly this is only directory. It would be intolerable if the cause had to be retried, because the judge, perhaps from sickness or pressure of business, or other cause, had not filed the decision within twenty days. But it is said that in cases in the County Court a different rule applies. That it is like the case of a justice of the peace taking time to give judgment after the case has been submitted to him for that purpose.

It is true; that by the late revision of the constitution, the Courts of Common Pleas were abolished, and the present County Court is in no sense a continuation of that court; the new court, by the terms of the constitution retains none of the powers of the old court, except jurisdiction in cases arising in justices' courts (*Const.* VI, 14); and that was conferred on the old court by statute, and was not common law jurisdiction. But the judiciary act gave to the new court all the powers and jurisdiction of the old Court of Common Pleas, as fully and amply as could be done, consistently with the provisions of the constitution and of that act (*Laws of 1847, chap.* 180, § 36). Indeed, it was the aim of that act, to transfer all the powers and duties of the old Court for the Correction of Errors, to the Court of Appeals; of the old Court of Chancery and of the Supreme Court, to the new Supreme Court; and to give to the County Courts the same general powers in all cases where they had jurisdiction of the subject matter as had been before possessed by the Courts of Common Pleas (§§ 8, 16, 36). The County Court has not the same general jurisdiction as was possessed by the Court of Common Pleas, for the constitution has limited it; but the judiciary act, as we have seen, where it has jurisdiction, has given to it, particularly in all

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matters of practice, the same broad discretion before possessed by that court. Every lawyer knows what were the almost unlimited powers of that court in mere civil actions, both in this country and in England (2 R. S. 208; *Colonial Laws of N. Y.* 2 R. L. App. No. 5; 2 Paine & Duer's Pr. 718; *Preface to 8 Coke Rep.* 17 Wend. 484).

I am not prepared to say, that, without the judiciary act, these county courts would be considered on a footing with the justices' courts on jurisdictional questions, particularly in cases arising in the latter courts, as jurisdiction is expressly conferred by the constitution in such cases. And certainly the judiciary act puts them on very different ground. In this view, I am clear, that Judge Dodge did not lose authority to file or even make his decision by the delay in this case. I had some doubt whether a mandamus could go, as he might still have the matter under advisement; in which case there should be no interference. But as it is stated that a decision has been made, and is not filed merely because of his doubts of the power now to do so, and this is rather to obtain the opinion of the court, an alternative mandamus may be issued. If the decision has been made, filing it is a mere ministerial act.

The cause has been argued without reference to the effect of § 267 upon suits in which there had been an appeal before the Code (§§ 461, 469, 29, 30, 31, 32, chap. 5, of tit. 11, and § 2 of the supplementary act). I shall therefore not examine that question now. If § 267 does not apply, of course there is no limitation as to time. Motion granted.

 Rogers agt. Wing.

SUPREME COURT.

ROGERS agt. WING.

On application and on payment of all damages and costs, as a matter of right, a party is entitled to a new trial in an action of ejectment. (*See Cooke vs. Passage*, 4 *How. Pr. R.* 360.)

Warren Special Term, August 1850. Application by the defendant for a new trial in ejectment, the judgment having been paid, pursuant to statute (2 *R. S.* 309). The action was commenced before the Code.

H. R. WING, in person, *for the Motion.*

E. H. ROSEKRANS, *for Plaintiff*, insisted that it was clear from the opinion of the court, given on a motion for a new trial, that the defendant had no defence; and that it was discretionary with the court whether a new trial should be granted; "shall" meaning "may," in such cases (§ 37).

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HAND, Justice.—The court has no discretion. The statute is imperative that a party, on application and payment of all the costs and damages recovered, shall have a second trial (2 *R. S.* 309 § 37; 2 *Paine & Duer's Pr.* 517; *Gra. Pr.* 676; *Shaw v. McMaren*, 2 *Hill*, 417). "May" and "shall or may," and "shall and may," sometimes, are imperative, and sometimes discretionary (see *Malcolm v. Rogers*, 5 *Cow.* 193; *Mayor of New York v. Furze*, 3 *Hill*, 612; *Rex v. Com. Flockwood Inclosure*, 2 *Chit. R.* 251; *Hudd v. Ravenor* 2 *B. & B.* 664; *King v. Bailiffs of Eyre*, 4 *B. & Ald.* 271; *Smith on Stat.* 724; *Dwarr. on Stat.* 712; 1 *Pet. U. S. R.* 64). But here it is "shall," and confers a right upon the party. The Code has made no change in this part of the practice (5 *Wend.* 101). Even in suits commenced under it. For, although the action of "ejectment" is not retained by that name, in actions for land, these provisions of the Revised Statutes apply. They are not inconsistent with the Code (§§ 455, 471; *Cooke v. Passage*, 4 *How. Pr. R.* 360). Motion granted.

Burrows agt. Miller & Miller.

SUPREME COURT.

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BURROWS agt. MILLER & MILLER.

A plea, to an action upon a promissory note, of the pendency of a suit for the same cause of action in a circuit court of *another state*, is bad. Such a plea was never allowed under the former rules of pleading; and although section 144 and 147 of the Code, taken in their literal sense, might appear to be broad enough to overturn this rule, evidently the intention of those sections was merely to affect the form of asserting a defence, not to alter the nature of it.

New York Special Term, January, 1850. To a complaint on a promissory note, the defendants pleaded the pendency of a suit for the same cause in one of the circuit courts of the State of Indiana; to which the plaintiff demurred.

BARNARD, *for Plaintiff*, cited *Browne vs. Joy* (9 J. R. 221); *Walch vs. Durkin* (12 J. R. 99).

DANA, *contra*, cited *Code of Procedure*, §§ 144, 147; *Embree vs. Hanna* (5 J. R. 101); *Wheeler vs. Raymond* (8 Cow. 311).

EDMONDS, Justice.—It is conceded that this plea is not good unless the Code has altered the former rule. Section 144 allows the defendant to demur to the complaint when it appears on the face thereof that there is another action pending between the same parties for the same cause of action and § 147 allows the objection to be taken by answer when it does not appear on the face of the complaint.

This language, it is true, is broad enough, taken in its literal sense, to overturn the former rule, and it is insisted that under it, we ought rather to adopt the rule which allows a foreign attachment to be pleaded in bar, than that which forbids a foreign suit to be thus pleaded.

The distinction between the cases is, however, very plain, and rests upon this idea, that it is payment or satisfaction alone under the foreign proceedings which is regarded in our courts. Hence actual payment under those proceedings may be pleaded in bar here; or, if too late for that, may be made available on an *audita*

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querella; and this upon the principle that though the creditor may pursue several remedies until he shall obtain satisfaction, the debtor shall be protected against being obliged to pay twice. Therefore it is, that a foreign attachment has been allowed to be pleaded, because the debtor's property having already been seized in satisfaction, he might be obliged to pay twice. Thus in all the cases in this state where the foreign attachment was allowed to be pleaded, it appeared that the debtor's property had actually been seized under it (*Embree vs. Hanna*, 5 *J. R.* 101; *Wheeler vs. Raymond*, 8 *Cow.* 311), and it may be questioned whether a plea of a foreign attachment would be good unless it should contain an averment that something had been seized under it. (See the form of such a plea, 2 *H. Pl.* 362; 5 *Taunt.* 234, *n*; 2 *Chitty R.* 338, *n* (b); 17 *J. R.* 284, and 1 *Brod. & Bing.* 490).

Hence a foreign attachment is likened to the case of a suit in a foreign court carried to judgment and execution and satisfaction thereon, and therefore it is that both may be pleaded in a suit pending.

It has, however never been held that a mere pendency of a suit in a foreign tribunal can be available to stay a suit for the same cause of action pending here, and unless the legislature have expressly made it so, I see no good reason why the rule should be changed.

It is evidently the intention of the sections of the Code to which I am referred, not to enlarge a defence or create a remedy, but merely to direct the mode in which defences or objections already available by law, may be taken advantage of, the nature of those defences or objections being left unaltered.

And the language of the third paragraph of § 144 and of § 147, must be taken to mean that a defence of another action pending, when available as then established by law, may be set up by demurrer when it shall appear on the face of the complaint and by answer when they do not.

To allow the argument put forth for the defendants and give to these sections, which were intended merely to affect the form of asserting a defence, the power of altering the nature of such

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defence would, I am persuaded, extend their scope and power far beyond their intention.

There must be judgment for the plaintiffs on the demurrer, and as the answers were merely dilatory, leave to amend must be denied.

SUPREME COURT.

5 How. 53—CONCURRED IN, 5 How. 470, 471

CARPENTER & WILCOX agt, WEST & VAN BENTHUYSEN.

Impertinent and scandalous matter, struck out of a complaint on motion, with costs.

The practice in this respect is not changed in what would have been equity cases before the Code.

An adverse party may always consider himself aggrieved by a pleading which is scandalous or impertinent.

It seems impertinence includes irrelevancy, redundancy and even prolixity.

It seems any one affected thereby, may move to strike out scandalous matter, ven though not a party to the suit.

Warren Special Term, August 1850. This was a motion to strike out those parts of the complaint which purport to set out portions of two affidavits. And also another part in which the plaintiff Carpenter, "expressly charges and alleges that the said defendants (West & Van Benthuyssen), some one or both of them, have been guilty of the crime of forgery, in crossing and obliterating the aforesaid endorsement made upon the aforesaid note with a pencil; and that the same was done to cheat and defraud the plaintiffs in this suit, and that the defendants have been guilty of other dishonest and fraudulent acts in obtaining the aforesaid judgment to injure and defraud the said plaintiffs."

The complaint stated that in May 1849, West recovered a judgment against the plaintiffs for \$93.33, in a justice's court, upon the joint guaranty, as it was called, of Carpenter as principal and Wilcox as his surety, made in June 1846, to secure the payment of about \$72, which was West's only claim against Carpenter. That in October 1846, C. paid West \$30, to apply thereon and took a receipt; and in December 1846, \$19 more and also took a receipt therefor; and about that time turned out

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to said West a note against one Huling for \$40·60, on which there was then due \$20·60, besides interest. That \$20 had been endorsed thereon by Carpenter with a pencil, and C. turned it out to said West subject to said endorsement, and for the balance then due thereon only, being about \$20·60 principal. Plaintiffs alleged, under information and belief, that West sued the note and recovered judgment against Huling for the whole face of the note and interest, being about \$43; and Huling paid this judgment to West or his attorney; and that when judgment was recovered there was no trace of the pencil endorsement, nor is there now. But Carpenter alleged that when he let West have the note, he let him have it only for the balance, about \$20·60, principal, and took a receipt to that effect. That including the whole of the note, West has received \$92, or thereabouts, on account of the guaranty, and now seeks to enforce the judgment. That besides these payments, before the guaranty, the plaintiff turned out a wagon, harness and buffalo robes, in security. After the guaranty C. sold the wagon, with West's consent, to one Van Dosen, and took his note and turned it out to West; but he did not recollect the amount of the sale or of the note, nor whether paid; but is informed and believes that Van Dosen was good, and the note, he thinks, was payable in six months, and given in the summer of 1846. The harness and buffalo robes were left with West to be disposed of and the proceeds to be credited to C., but plaintiffs did not know what had become of them.

That Wilcox knew nothing of the judgment till March, and Carpenter in April last. That negotiations had been had to be let in to defend which had failed. West had assigned the judgment to Van Benthuyssen and was insolvent and had left the county, and all the payments were made before the assignment. Wilcox only was served with process and appeared. Carpenter did not. The suit was on the guaranty and West and Carpenter both then lived out of the county. Wilcox's attorney with the consent of plaintiff's attorney, got it put off more than a year, he stating to the justice he understood C. had paid or arranged it in some way with West. Wilcox had no idea that

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the suit before the justice would proceed, as they had an understanding with the attorney for West that he would not proceed without notice to the attorney of Wilcox. The complaint further stated that the plaintiffs had procured the affidavit of the justice, and this they incorporated in the complaint, in which the justice says the cause was adjourned definitely and indefinitely from time to time. The last adjournment was by consent from the 2d to 14th May 1849, and that the attorney of Wilcox, at the last adjourned day, did not appear, and the justice desired West's attorney to have it adjourned again, which he declined, but said he would take a judgment and open it if Wilcox's attorney desired, or it might be opened for an appeal. The affidavit of Wilcox's attorney (before the justice) was also inserted in the complaint. He stated that the first he knew of the judgment was in March 1850, and then West's attorney told him he should let them put in a defence if they had any, or appeal, but afterwards refused to do so.

Carpenter alleged that all of said guaranty had been paid. That when West received the Huling note, it was understood that when paid, that paid the balance due on the guaranty.

The complaint then charged forgery and dishonest and fraudulent acts as already stated, and prayed for relief against the judgment.

C. S. LESTER, *for the Motion.*

W. L. AVERY, *Contra.*

HAND, Justice.—“If irrelevant or redundant matter be inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby” (*Code*, § 160). If this clause does not include scandalous and impertinent matter, it contains no prohibition, and they may still be struck out of a pleading. The old practice in this respect yet exists (*Code*, 469; *Rule* 92). It would be monstrous if there were no mode of purifying the record by expunging scandalous matter. It can not be done by demurrer (1 *Dan. Practice*, 401; *Code*, § 144). By “irrelevant or redundant” in the *Code*, I take it is meant, what is usually understood as impertinent; for a pleading in equity is impertinent,

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when it is stuffed with long recitals, or long digressions, which are altogether unnecessary and totally immaterial to the matter in hand (*Hoff. Master* 317; 1 *Dan. Pr.* 399; 1 *Barb. Pr.* 41; *Woods v. Morrell*, 1 *J. C. R.* 106; *Story Eq. Pl.* § 266). It is like surplusage at law. According to Webster, *redundant* means superfluous, more than is necessary, superabundant; and *irrelevant*, not applicable or pertinent, not serving to support. Both, therefore, may probably come under the head of impertinent. Prolixity may become redundance, and Lord Eldon held, that needless prolixity was in itself impertinence (See the cases 1 *Dan. Pr.* 400).

It has been thought irrelevant and redundant matter should not be struck out unless a party is aggrieved or prejudiced thereby (*White v. Kidd*, 4 *How. Pr. R.*, 68; *Hynds v. Griswold*, *id.* 69). With deference, I doubt that this is so to the fullest extent. As to scandalous matter, it is not clear that a person not a party to the record may not move to strike it out (*Coffin v. Cooper*, 6 *Ves.* 514; *Williams v. Douglass*, 5 *Bear.* 82; *ex parte Simpson*, 15 *Ves.* 477; 5 *id.* 656, *note*). And the court, it seems, will do it without application of any one (*Ex parte Simpson*, *supra*). And impertinence in an answer was always exceptionable. My own impressions are, that as to scandalous and impertinent, irrelevant and redundant matter, the Code has not in any respect changed the former practice in equity cases (see *Shaw vs. Jayne*, 4 *How. Pr. R.* 119; *Knowles vs. Gee*, *id.* 317). Its effect on what, before the Code, would have been cases at law, is not now under consideration. If this view is correct, the adverse party may always be considered aggrieved by scandalous, irrelevant, impertinent and redundant matter in a pleading. I think one may be considered aggrieved by the interpolation of matter into the pleadings in a cause, in which he is party, foreign to the case; and he always had a right to have the record expurgated for that reason without reference to the question of costs. If relevant, it can not be scandalous (*Ld. St. John v. Lady St. John*, 11 *Ves.* 526; *Stor. Pl.* 269). And a few unnecessary words will not make a pleading impertinent (*Del Pont v. De Tastel*, 1

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Tur. & Russ. 486; *Des Places v. Goris*, 1 *Edw. & C. R.* 350). And courts should be liberal, especially until our novel system of pleading shall have become better settled and understood. Every fact, direct or collateral, tending to sustain the general allegations of the bill, may be inserted, if done in a proper manner (*Hawley vs. Wolverton*, 5 *Paige*, 522; *Perry vs. Perry*, 1 *Barb. C. R.* 519). And in *Delpont v. De Tastel* (*supra*), which, however, goes to the extent of the rule, extracts from letters of the defendant were permitted for the purpose of eliciting answers as to those letters.

But the principal case is very different. Here, portions of two affidavits, probably extrajudicial, by persons not parties to the suit, are inserted, neither of which amount to more than the mere statements of third persons, and are in no sense papers or transactions between the parties, and can not be given in evidence, nor their existence or validity be put in issue between them. *Chance* or *Kent* thought the best test by which to ascertain whether the matter be impertinent is, to try whether the subject of the allegation could be put in issue and would be matter proper to be given in evidence between the parties (*Woods v. Morrell*, 1 *J. C. R.* 106). The plaintiff might as well have inserted a letter from his own attorney, giving his recollection of the history of the case.

The allegation that one or both of the defendants were guilty of forgery, and also the allegations of fraudulent and dishonest acts in obtaining the judgment, without specifying what those acts were, are still more exceptionable. The complaint alleges that when the plaintiff Carpenter, transferred the note against Huling to West, there was upon it an indorsement in pencil of \$20; that, as he is informed and believes, West obtained judgment against Huling for the whole amount, without deducting the \$20, and is also informed and believes that there was no trace of this indorsement on it at that time, and that Huling has paid the judgment; and that it was understood that when Huling paid what was due, deducting the indorsement, that completed the payment of Carpenter's debt to West. If Carpenter sold the note

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for a certain sum, as he alleges, and West afterwards recovered the whole amount, that seems to be a matter between him and Huling the payor. No liability of Carpenter therefor is suggested. This then is irrelevant. But the plaintiff Carpenter goes further, and expressly alleges and charges that West and Van Benthuyssen "some one or both of them, have been guilty of the crime of forgery in crossing or obliterating" the endorsement, and that it was done to cheat and defraud the plaintiffs. As to Van Benthuyssen, this seems to be the only connection he has had with the note; for it does not appear that he ever heard of it before. As to West, the charge, if true, is wholly irrelevant, and not issuable in this cause, and bears cruelly upon his moral character, and is therefore scandalous; more so I think than in case of *Simpson ex parte (supra)*, and *Somers v. Torrey (5 Paige, 54)*, where the matter was expunged with evident marks of reprobation. The general charge of their dishonest and fraudulent acts to obtaining the judgment, is also not issuable and is scandalous.

The motion must be granted with costs.

5 How. 58—AFFIRMED, 17 Barb. 103.

SUPREME COURT.

VOORHEES & WIFE agt. THE PRESBYTERIAN CHURCH of Amsterdam
Village and others.

Where a religious society, incorporated and organized under the act to provide for the incorporation of religious societies, passed 27th March 1801, appointed D, D, and others, all members of the congregation, a building committee (on the 25th Nov. 1830,) for the purpose of purchasing a new church site and of erecting a new church edifice thereon; which purchase was made and a deed taken in *their own names as individual grantees*, (instead of the trustees of the society), and subsequently erected a church edifice on the premises so purchased; all being paid for with moneys raised by the society, on sale of the old church lot and by subscription. Then this building committee by an *absolute conveyance* (dated 9th Aug. 1832), granted and conveyed to S— V—, in consideration of \$43, Pew No. 45 in the new church. Subsequently, the building committee, by deed (dated May 26, 1834), conveyed to the Trustees of the corporation the new church lot and edifice, reserving

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therein "to the owners of the pews or slips the right to use the same in perpetuity." And in pursuance of a vote of the congregation, the Trustees (in 1848), made extensive alterations and repairs in the interior of the church, by which the pew of S. V. was removed and the pulpit erected upon its place. In an action by S. V. against the church and trustees to recover possession of his pew, and damages for his ejection therefrom and for its removal, &c. *Held*, that the conveyance to S. V. of Pew No. 45, not being authorized by the act to provide for the incorporation of religious societies (*supra*), was void, and conveyed no title to him.

D. D. and his associates acquired and held the title as *mere naked trustees* for the use of the congregation. And this legal title was by the 4th section of the act of April 1813 (same as in 1801), immediately transferred to the trustees of the corporation. That act being sufficiently comprehensive to take the case out of the statute of frauds (2 R. S. 135, § 6).

It seems, that by that act effect may be given to even a *parol trust* in favor of a religious corporation.

But the corporation had an *equitable interest* in the new church edifice and lot to be protected. D. D. and his associates took the conveyance in their own names; but the consideration therefor having been paid by the corporation, they must be considered, in equity, as holding the estate in trust for their principal or *cestui que trust*. And this equitable estate of the corporation was immediately by the 4th section of the act (*supra*) turned into a legal estate. And a subsequent purchaser, with notice of the trust, becomes a trustee chargeable with the trust, notwithstanding he may have paid a full consideration. S. V. at the time he took his conveyance, having a knowledge of facts sufficient to put him on enquiry as to the trust in favor of the corporation, purchased subject to all the legal and equitable rights of the corporation in the church lot and edifice. And as D. D. and his associates had no title, nor any right to convey, S. V. acquired under his deed, no estate whatever in the pew.

But the trust in the new church edifice and lot in favor of the corporation can be sustained as a valid *resulting trust*, either at common law or under the article of the Revised Statutes relative to Uses and Trusts.

There being no evidence in the case that either the trustees of the congregation or the corporators, either consented that D. D. and his associates should take the deed in their own names, or that they had any knowledge, at the time, that it was so taken; and the consideration having been paid by the corporation; a trust therefore resulted in favor of the corporation; and the beneficial interest in the premises was immediately by the 45th section of the article relative to uses and trusts, or by the 4th section of the general act (*supra*), turned into a legal right. S. V. not being a purchaser without notice of the resulting trust, does not come within the 54th section of the article relative to uses and trusts.

The trustees of the congregation had an *equitable title* to the church edifice, even if the legal title to the lot was not in them. S. V. being regarded as purchaser with notice of this equitable interest, took his title to the pew subject thereto.

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Under either of the cases mentioned, S. V. acquired no title whatever, either legal or equitable to the pew in question by the conveyance of D. D. and his associates.

Regarding however the deed to S. V. (after a conveyance to the trustees by D. D. and his associates) as a deed from the trustees of the corporation, *held*, that the trustees of a religious corporation, incorporated under the act to provide for the incorporation of religious societies, can not make an *absolute sale, in perpetuity, of the pews of the church, without the reservation of rent in the deeds of conveyance*. They have no power except such as is derived from that act; and that, only authorizes them to *demise and lease* the real estate (or sell absolutely under the chancellor's order, or to *rent* the pews of the church.

But if the trustees had executed a *valid lease* of Pew No. 45 to S. V. he could not maintain an action against the trustees to recover *possession* of it, or the place formerly occupied by it. The right acquired by S. V. would have been a right *to the use of the pew during divine service* "in subordination to the more general right of the trustees in the soil and freehold." His title would be subject to the right and power of the trustees to alter and repair the church. The interest of a pewholder in his pew, is a qualified interest. It is limited to its use during divine worship. It is limited too as to time. If the house is burnt or destroyed by time, the right is gone.

A pewholder has a remedy where his pew is destroyed *for convenience only*; or where the trustees have been guilty of a *wanton and malicious abuse of their power*, in destroying it. The only remedy is, by an action to recover damages by way of an indemnity for the loss of his pew.

Montgomery Circuit, Feb. 1850. This cause was tried at the Montgomery circuit by the court. The action was brought to recover possession of Pew No. 45 in the church of the defendants or the place formerly occupied by it. The action was brought to recover possession of Pew No. 45 in the church of the defendants or the place formerly occupied by such pew in the church edifice, and damages sustained by reason of the trustees of the church entering upon such pew and ejecting the plaintiffs therefrom and removing such pew with the appurtenances, &c. It appeared by the pleadings and was conceded on the trial that the church was regularly incorporated in 1807 under the general incorporating act of 1801 (1 *Webst. & Skin. ed.* 338); and that the other defendants were the trustees of the church. On the 25th Nov. 1830, David Deforest and others, all members of the congregation, were appointed by the congregation a building committee for the purpose of purchasing a new church site and of erecting a new church edifice thereon. This building committee by deed bearing date the 25th Nov. 1830, purchased a church lot, and instead of

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taking the deed in the names of the trustees of the society, took it in their own names as individual trustees. They after the purchase of the lot proceeded to erect and erected a church edifice thereon. The church lot and edifice were paid for with moneys raised from the sale of the old church lot and edifice owned by defendants and out of subscriptions by members of the congregation. After the new church edifice was erected, the building committee, by an absolute conveyance dated the 9th August, 1832, in consideration of \$43 to them in hand paid, granted and conveyed to the plaintiff Samuel Voorhees, and his heirs and assigns, pew No. 45 in the new church edifice, described as being in the new brick Presbyterian church in the village of Amsterdam. This conveyance was signed and sealed by the grantors, but not witnessed or acknowledged. On the 1st January, 1840, S. Voorhees assigned all his right and interest in said deed to Betsey R. Voorhees his wife, the other plaintiff, in consideration of one dollar. This assignment was signed and sealed by S. Voorhees, but not witnessed or acknowledged. The conveyance of the pew to S. Voorhees and assignment to his wife were objected to as evidence on the ground that their execution were neither acknowledged nor attested by a witness. By deed dated May 26th, 1834, the building committee conveyed to the trustees of the corporation the new church lot and edifice, reserving therein "to the owners of the pews or slips the right to use the same in perpetuity." Several years since the plaintiffs ceased their attendance upon divine worship at this church; but they have continued to rent their pew to members of the congregation. Most of the owners of the pews have surrendered their pews to the trustees to be rented for the purpose of raising means to pay the salary of the minister. In 1848 the church edifice needed extensive repairs, and the increase of the society required additional seats for the accommodation of its members. In that year in obedience to a vote of the members of the congregation, the trustees thoroughly repaired the church and caused all the old pews and slips to be removed, and others to be constructed, and the whole arrangement of the interior of the edifice to be altered and improved,

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and the pulpit to be taken down and a new one erected and its site to be changed. In this new arrangement, the plaintiff's pew was taken down and removed and the pulpit erected in its place. The repairs and alterations were judicious and required by the good of the society. Under the new arrangement of the seats, more persons can be seated in the church than could have been done before. The means of paying the expense of the repairs, were raised by subscription. Ever since the new edifice was erected in 1830, it has been used as a house of divine worship, and there has been maintained in it a stated preaching of the gospel.

T. B. MITCHELL and O. MEADS, *for Plaintiffs*.

C. B. COCHRAN and D. P. COREY, *for Defendants*.

PAIGE, Justice.—The Presbyterian Church of Amsterdam village, &c., one of the defendants, was regularly incorporated under the "act to provide for the incorporation of religious societies," passed 27th March 1801. The 4th section of that act provided that the trustees of the congregation incorporated under the act were authorized and empowered to take into their possession and custody all the temporalities belonging to the congregation whether the same consisted of real or personal estate, and whether the same should have been given, granted or devised directly to such congregation, or to any other person for their use. That section also authorized the trustees to recover, hold and enjoy all the debts, demands, rights and privileges, and all churches, meeting houses, &c., with the appurtenances, and all estates belonging to such congregation in whatsoever manner the same may have been acquired, or in whose name soever the same may be held, as fully and amply as if the right or title thereto had originally been vested in the trustees; and also to purchase and hold other real and personal estate, and to demise, lease and improve the same for the use of the congregation, &c.; and also to repair and alter their churches or meeting houses and to erect others if necessary, and to regulate and order the renting of the pews in their churches or meeting houses.

This general incorporating act was reenacted in *haec verba*

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with the addition of a few more sections, on the 5th April, 1813. The act of the 5th April 1813, was not revised or repealed when the Revised Statutes were adopted, and it still remains in force (*see 3 Rev. Stat. 244, 3d ed*). Section 11 of the act of 5th April provides that the chancellor, upon the application of a religious corporation, &c., may make an order for the sale of any real estate belonging to such corporation and may direct the application of the proceeds of the sale, &c. In *Dutch Church in Garden street vs. Mott* (7 *Paige* 81), the chancellor held that the 4th section of the act of March 1801 transferred to the trustees of an incorporated religious society, without any conveyance, the legal title of any real or personal property held in the name of others upon a mere naked trust, for the use of the church or congregation, or of the corporators. The 4th section of the act of the 5th April 1813, is a literal copy of the 4th section of the act of March 1801.

Daniel Deforest and his associates who, as the building committee appointed by the congregation, purchased the site of the new church, by taking the deed in their own individual names as grantees, acquired and held the title as mere naked trustees for the use of the congregation. And this legal title was by the 4th section of the act of April 1813, immediately transferred to the trustees of the corporation. It may be objected, as the use or trust in favor of the corporation is not expressed in the deed, or manifested by some declaration of trust in writing, that it is void under the statute of frauds; which declares that no trust can be created unless by act or operation of law, or by a deed or conveyance in writing (2 *R. S.* 135, § 6, *1st ed.*). I think, however, that the language of the 4th section of the act to provide for the incorporation of religious societies is sufficiently comprehensive and explicit to give effect to a use or trust in favor of an incorporated religious society, although not expressed in the conveyance to the trustees or in a declaration of trust. The words of that section are, that the trustees of the religious society when incorporated, "shall hold and enjoy all estates belonging to the society, in whatsoever manner the same may have been acquired, or in

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whose name soever the same may be held, as fully and amply as if the right or title thereto had originally been vested in the trustees." The statute of frauds, passed the 26th February 1787, was not reenacted in either the revisions of 1801 or of 1813. It was, however, revised and consolidated in the Revised Statutes of 1830. The act to provide for the incorporation of religious societies was reenacted in both 1801 and in 1813. I am inclined to believe that the intent of the legislature was to give effect to even a parol trust in favor of a religious corporation. The subsequent reenactments of the act to provide for the incorporation of religious societies, without reenacting the statute of frauds, may be regarded as a modification or amendment of the statute of frauds, so far as to make a use or trust in favor of a religious society an exception to the provision of the statute of frauds, which required that declarations of trust should be in writing. That part of the statute of frauds, which relates to the creation of estates or trusts in lands being by deed or conveyance in writing contained in the Revised Statutes may be regarded as a mere consolidation and publication therein of that part of the old statute of frauds. And such consolidation and publication will not be deemed to alter the old statute of frauds so far as it effects uses and trusts in favor of religious societies (3 *R. S.* 184, 3d ed. *Repeal Act*, § 2; 2 *Hill*, 380, note C.)

In *Tucker vs. The Rector &c. of St. Clements Church* (8 *v. N. Y. Legal Observer*, p. 257, (No. 8). The Superior Court of the city of New York decided that the powers of religious corporations incorporated under the general act, were not affected by the provisions of the Revised Statutes in relation to uses and trusts. See opinion of DUER, J. If the article of the Revised Statutes in relation to uses and trusts) which enacts the most radical changes in the law of uses and trusts) is not applicable to religious corporations incorporated under the general act, the 5th section of the title in relation to fraudulent conveyances (2 *R. S.* 135) requiring the creation of estates or trusts in lands to be by deed or conveyance in writing which is a substantial reenactment of section 10, and part of section 12 of the old statute of

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frauds, without material alteration, should not be deemed applicable to uses and trusts in favor of such religious societies.

But under another view which may be taken of this case, the corporation had an equitable interest in the new church edifice and lot, which a court of equity will protect. It is a rule in equity that no party is permitted to purchase an interest in property and hold it for his own benefit, where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account and for his individual use (*Van Eps vs. Van Eps*, 9 *Paige*, 241; *Torrey vs. Bank of Orleans*, *id.* 649). And if he takes a conveyance in his own name he will in equity be considered as holding the estate in trust for his principal or *cestui que trust* (*Sweet vs. Jacocks*, 6 *Paige*, 355); and a subsequent purchaser with notice of the trust becomes a trustee chargeable with the trust, notwithstanding he may have paid a full consideration (1 *John. Ch.* 450, 566; 4 *John. Ch.* 135). In this case Deforest and his associates acted as agents and trustees of the corporation or of the corporators, in the purchase of the site of the new church and in the erection of the new church thereon. They paid for the lot and the expenses of the new church with moneys belonging wholly to the corporation. The moneys so paid were composed of the proceeds of the old church lot and edifice and of moneys raised by subscription from the members of the congregation, which are to be regarded as donations to the corporation and therefore as belonging to the corporation. Deforest and his associates took the legal title to the new church lot as mere naked trustees of the corporation, and the equitable estate of the corporation as *cestui que trust* therein was immediately by the 4th section of the act for the incorporation of religious societies turned into a legal estate. The evidence shows that S. Voorhees had at least a knowledge of facts sufficient to put him on inquiry as to the trust in favor of the corporation at the time he purchased the pew in question; and having such notice he purchased subject to all the legal and equitable rights of the corporation in the new church lot and the new church edifice; and as at the time Voorhees received from the building

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committee a deed of the pew in question, they had no title to, nor any right to convey the same, he acquired under his deed no estate whatever in the pew.

The counsel for the plaintiffs contend that the article of Uses and Trusts in the Revised Statutes is applicable to religious corporations, and that no trusts in favor of a religious society or corporation are now valid unless they are authorized by that article. If this doctrine is to be received it would subvert all simple trusts in favor of a religious society not incorporated; and the trustees of the society when incorporated under the general incorporating act, would have no right or power as authorized by the 4th section of that act to take into their custody real estate which may have previously been granted to trustees for the use of the society. The act to provide for the incorporation of religious societies was neither revised or repealed when the Revised Statutes were adopted. And I believe that act remains in force with all the attributes it possessed previous to the adoption of the Revised Statutes. The Superior Court of the city of New York in the case of *Tucker vs. the Rector &c., of St. Clements Church (supra)*, came to this conclusion. In that case *DUER, J.* and his associates *Justices MASON and CAMPBELL*, held that the powers of religious corporations, incorporated under the general act, were not affected by the provisions of the Revised Statutes in relation to uses and trusts. Notwithstanding the modification of the law of uses and trusts by the Revised Statutes a conveyance to a person for the use of a religious society not incorporated, made since the adoption of the Revised Statutes, will create a valid trust in favor of such society; and the 4th section of the act to provide for the incorporation of religious societies will immediately on the incorporation of the society transfer the legal title to the trustees of the corporation. If the article of uses and trusts in the Revised Statutes should be regarded as applicable to religious corporations, a conveyance in trust for, or for the use of, an incorporated religious society, would by virtue of the 47th section of that article pass the legal estate directly to the corporation (*Wait vs. Day, 4 Denio, 442*).

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But if there should be any doubt about sustaining the validity of a trust in the new church edifice and lot in favor of the corporation, upon either of the foregoing grounds, there can be no doubt that the trust was valid as a resulting trust, either at common law, or under the article of the Revised Statutes relative to uses and trusts. I have already stated that the facts of the case authorize me to find that the purchase money for the new church lot was wholly paid for by the religious corporation. At common law, if a conveyance of real estate is made to one person, and the consideration is paid by another, a trust in equity results in favor of him who paid the money. The Revised Statutes have modified this rule of the common law and provide that no such trust shall result in favor of the person paying the consideration, unless the conveyance shall have been taken without his consent or knowledge in the name of the alienee (10 *Paige*, 567; 2 *R. S.* 14, §§ 51, 2, and 3, 3d ed.; 4 *Kent Com.* 305, 306). In this case there is no evidence that either the trustees of the congregation or the incorporators, either consented that Deforest and his associates should take the deed of the new church lot in their own names, or that they or any one of them had any knowledge at the time of the execution and delivery of the deed, that it was so taken. A trust therefore resulted in favor of the corporation and the beneficial interest of the corporation in the lot was immediately by the 45th section of the article relative to uses and trusts, or by the 4th section of the general act for the incorporation of religious societies turned into a legal right (*Wait vs. Day*, 5 *Denio*, 442; 7 *Paige*, 181). The evidence shows that the plaintiff S. Voorhees, had knowledge of facts sufficient to put him on inquiry as to the trust in favor of the corporation. It is a well settled principle that if a party acts in the face of facts and circumstances which are sufficient to put him on inquiry, he acts contrary to good faith and at his peril (*Anderson vs. Van Allen*, 12 *John.* 345). The plaintiffs therefore do not bring themselves within the 54th section of the article relative to uses and trusts. They are not purchasers without notice of the resulting trust in favor of the corporation, within the meaning of that section. The

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conveyance of the pew in question to Voorhees described it as being in the new brick Presbyterian Church in the village of Amsterdam. The church was erected as a house of public worship for the members of the Prosbyterian Church of Amsterdam village. Voorhees was bound to inquire to what religious corporation belonging to the Presbyterian denomination, the church referred to in his deed belonged, and what interest such corporation had in the church. He had no right to presume that his grantors erected the church on their own individual property, or for their own exclusive benefit. It is sufficient to constitute a resulting trust, if the consideration money upon the purchase was advanced by some other person as a loan to the *cestui que trust*, or as a gift to him, or for his benefit (1 *Bar. Ch. R.* 499; 1 *John. Ch.* 582; 5 *John. Ch.* 1); and if the *cestui que trust* pays only a part of the purchase money there will be a resulting trust in his favor *pro tanto* (4 *Kent Com.* 306; 2 *John Ch.* 410).

If the evidence authorizes the inference that Deforest and his associates purchased the new church lot for their own individual benefit; and took the deed in their own names with intent to defraud the corporation or the corporators, then a trust resulted in favor of the corporation, on the ground of a purchase by them of the church lot with moneys belonging to the corporation in violation of the trust reposed in them by the congregation (2 *R. S.* 14, § 53, 3d ed.; 4 *Kent Com.* 306; 10 *Paige*, 249).

If there was no valid trust in favor of the religious corporation in the church lot, and if the legal title of the lot was in Deforest and his associates, the corporation had nevertheless an equitable title to the church edifice. That was erected with the money of the corporation; money raised by the sale of the old church lot and by subscription for the benefit of the corporation. The church was erected by Deforest and his associates and of course with their consent. Under these circumstances the trustees of the corporation, for the benefit of the congregation and its members, had a beneficial interest in the church edifice which equity would protect and preserve for the use of the congregation. And if Voorhees had notice of this equitable interest in the church

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edifice at the time he received his conveyance to pew No. 45, he took his title subject to this prior equitable interest. The rule in equity is also applicable to this case, that if a man stands by and suffers another to build on his land and sets up no right to it, he will lose his land (7 *John*. 243; 1 *John*. Ch. 354). In this case there is no evidence to show that the trustees of the corporation knew that the legal title was in Deforest and his associates, when the church was erected.

If a trust resulted in favor of the corporation on the delivery of the conveyance to Deforest and his associates, which was turned into a legal right, or if the corporation in any of the other modes hereinbefore mentioned acquired an equitable estate and interest in the church lot and church edifice which was transmuted into a legal estate, Voorhees acquired no title whatever, either legal or equitable, to the pew in question, under his conveyance from Deforest and his associates.

But inasmuch as the trustees of the congregation in May 1834, accepted a deed from Deforest and his associates of the new church lot and edifice, reserving to the owners of the pews or slips the right to use the same in perpetuity, I will regard the deed to S. Voorhees in like manner as I would have done, had it been executed by the trustees themselves. This is the most favorable view of the case which can be taken for the plaintiffs. For as the religious corporation had an equitable estate in the church lot and edifice of which the plaintiffs had notice, Deforest and his associates in their sale of the pew in question to S. Voorhees must be regarded as acting merely as trustees of the corporation; and they could not, therefore, exercise any power of alienation which the trustees of the corporation did not themselves possess. I am aware that this reservation may be criticised. It may be said if Deforest and his associates had no right or authority to sell the pews, that the grantees acquired no title thereto, and that therefore there was no owners of pews to whom the reservation in the deed applied. And it may also be insisted that this reservation in favor of the owners of the pews or slips is void for another reason. A reservation or exception in a deed in favor

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of a third person who has no title or interest in the land is inoperative (*Jackson vs. Swart*, 20 *John*. 87; *Hornbeck vs. Westbrook*, 9 *John*. 73; *Hornbeck vs. Sleight*, 12 *John*. 200; 2 *Hill. Ab.* 360, § 147). Voorhees was a stranger to the deed from Deforest and his associates to the trustees of the corporation. He had no title or interest in the pew in question at the date of that deed.

Regarding, however, the deed to S. Voorhees as a deed from the trustees of the corporation, the question presents itself whether the trustees of a religious corporation, incorporated under the act to provide for the incorporation of religious societies, can make an absolute sale in perpetuity of the pews without the reservation of any rent in the deeds of conveyance. The 4th section of the act authorizes the trustees to hold and enjoy all churches, &c., and all estates belonging to the congregation, &c., and to purchase and hold other real and personal estate, and to demise, lease and improve the same for the use of the congregation; to repair and alter the churches and to erect others if necessary, and to regulate and order the renting of the pews in the churches. The 11th section authorizes the trustees to sell any of the real estate of the corporation on obtaining the chancellor's order for that purpose. These two sections embrace all the powers of sale and disposition of the real estate of the corporation conferred upon the trustees by the act. They have no power to sell absolutely any part of the real estate without the chancellor's order. They can demise and lease the same, or rent the pews without such order. Their powers of disposition are limited by the act to a demise or lease of the real estate or to the renting of the pews in the church, and to a sale of the real estate absolutely on obtaining the chancellor's order directing the sale. An absolute sale and conveyance of the real estate without the chancellor's order would convey no title (2 *Kent Com.* 281; *Dutch Church in Garden street*, 7 *Paige*, 83 and 4). The conveyance of the pew in question to S. Voorhees was an absolute sale in fee. If it was a sale of real estate, within the meaning of the 11th section, it was void because it was not authorized by the chancellor's

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order. If it was a conveyance under the 4th section, it was void because it was not a lease reserving rent, but an absolute grant without condition or reservation. "A lease is a contract for the possession and profits of lands and tenements on the one side and a recompense of rent or income on the other; or a conveyance of lands, &c., to one for life, for years, or at will, in consideration of a rent or other recompense (1 *Hill. Ab.* § 1, 129, 130; 7 *Cow.* 326; 4 *Kent. Com.* 85; 2 *Bouv.* 17). The words of conveyance appropriate in a lease are "demise, lease, and to farm let," (1 *Hill. Ab.* 130, § 6). These words are technical words well understood, and are the most proper that can be used in making a lease (2 *Bouv. L. Dic.* 18). The technical meaning of *demise* is a lease for a term of years (1 *Bouv. Dic.* 445). The meaning of the words demise and lease, as used in the 4th section of the act to provide for the incorporation of religious societies, is very clearly a lease for years in consideration of rent. If a sale of pews in a church is not a sale of real estate within the meaning of the 11th section of the act, as was held by Justice WOOWORTH in *Freligh vs. Platt* (5 *Cow.* 496), because the grantee acquires a limited usufructuary right only, it may be contended that the authority given in the 4th section to the trustees to demise and lease the real estate of the church, does not apply to a lease of the pews, because pews *separaté* from the seizin and possession of the soil and building are not real estate within the meaning of the act. If this is the true construction of the section the only authority conferred by the act upon the trustees to lease the pews is to be found in the power given them to regulate and order the renting of the pews. At common law, corporations aggregate have an incidental right to alien and dispose of their lands and chattels unless specially restrained by their charters or by statute. But the powers of religious corporations incorporated under the general act, are limited by that act to a demise, lease, or improvement of their real estate. And they have no power of sale without the chancellor's order (2 *Kent Com.* 281, 2d ed.; 7 *Paige*, 83). Where the powers of a corporation are enumerated in its charter the maxim "*expressio unius exclusio alterius*" is

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applied and the enumeration is construed as a prohibition of all it does not embrace (Tucker vs. St. Clements Church, Superior Court, 8 *N. Y. Legal Observer*, 261). A corporation has no powers except such as are specifically granted, and those which are necessary to carry into effect the power expressly granted. The specification of certain powers operate as a restraint to such objects only, and is an implied prohibition of the exercise of other and distinct powers (People vs. Utica Ins. Co. 15 *John*. 382; THOMPSON, J). It is also a general rule that a corporation can only act in the mode prescribed by the law creating it (2 *John*. 114; Beattie vs. Marine Ins. Co. 7 *Cow*. 462; Jackson vs. Hartwell, 8 *John*. 330). The deduction from these principles is clear, that the trustees of a religious corporation, incorporated under the general act, have no power to make an absolute sale of a pew in perpetuity without reservation of rent. If the trustees are regarded as the donees of a power, or as invested with a statute authority, they in either case are bound to pursue the power or authority in the mode and form of alienation prescribed by the general act for the incorporation of religious societies. If this is not done in their alienations of the real estate of the corporation, the deed will be void (1 *Hill*, 114, 115; 2 *Cow*. 228; 4 *Kent Com.* 344, 2d ed). If the act to provide for the incorporation of religious societies, confers no powers on the trustees to make an absolute sale of a pew in perpetuity without reservation of rent; it seems to me that the grant to S. Voorhees can derive no aid from the doctrine of *Cy Pres*. This doctrine applies to devises and it authorizes the court to give effect to the intention of the testator as far as the rules of law will allow (*Cruise Dig. Tit.* 38, *Demise*, ch. 9, § 18; 1 *Bouv. L. Dic.* 401; 2 *Story Eq. Jur.* § 1169). Nor can the plaintiffs derive any aid from the rules of construction applicable to conveyances which derive their effect from the statute of uses. They can derive no aid from the rule that if a deed can not operate in the manner intended by the parties, it will be construed to operate in some other manner, if consistent with the rules of law; or from the rule that in the construction of a conveyance, the intent of the parties will be carried

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into effect so far as it can be collected from the whole instrument and is consistent with the rules of law (*Cruise Dig. tit. Deed, ch. 23, § 17*; 16 *John. 178*; 22 *Wen. 489*; 1 *R. S. 748, § 2, 1st ed.*) In this case the intention of the parties can not in any manner be carried into effect consistent with the rules of law (16 *John. 178*; 22 *Wen. 489*; 2 *R. S. 33, § 2, 3d ed.*). The trustees of the religious corporation had no power to alienate or dispose of the real property of the church, except such as was derived from the act to provide for the incorporation of religious societies; and that act only authorized them to demise and lease the real estate of the church or to rent the pews. I concede that in certain cases the execution of a power may be good in part and bad in part, and that the excess only will be void. But this is only where there is a complete execution of the power and only a distinct and independent limitation unauthorizedly added, and the boundaries between the sound part and the excess are clearly distinguishable, as in the case of a power to lease for 21 years and the lease is made for 26 years (4 *Kent Com. 346*). In such a case the lease is bad at law, but good in equity for 21 years, because it is a complete execution of the power, and it appears how much it has been exceeded (4 *Kent Com. 107*; 1 *Bar. 120*; 1 *Swans. 337, 357*; 10 *East, 158*). So where the good and bad part of a trust can be separated, and the one can be sustained without giving effect to the other, the good part will be held valid, while the bad part is held void. As where there is an assignment in trust to sell and mortgage real estate for the benefit of the creditors; the assignment may be held valid as to the trust to sell, although the trust to mortgage is void (*Darling vs. Rogers, 22 Wen. 483. In Error, 5 Paige, 320, Hawley vs. James*). In this case the good and bad parts of the deed can not be separated, as can be done in the case of a power to lease for 21 years, and a lease is executed for 26 years. It does not appear here how much the power of the trustees has been exceeded, so that the excess may be declared void.

The conveyance of the pew in fee to S. Voorhees can not enure as a lease or be construed to operate as a lease. The court

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can not make an entire new contract for the parties. They have no power to declare how long the lease shall run or what rent shall be reserved in it. Here the intent of the parties to convey absolutely in fee can not be carried into effect consistent with the rules of law.

I therefore conclude that the conveyance to the plaintiff S. Voorhees, of pew No. 45, not being authorized by the act to provide for the incorporation of religious societies, was void and conveyed no title to him, and that his assignment consequently passed no title to his wife.

But if the trustees had executed a valid lease of pew No. 45 to the plaintiffs, the plaintiffs could not have maintained an action against the trustees to recover possession of the pew or the place formerly occupied by it. The right acquired by the plaintiffs would only have been a right to the use of the pew during divine service, "in subordination to the more general right of the trustees in the soil and freehold." They took their title subject to the right and power of the trustees to alter and repair the church (3 *Hill*, 26; 3 *Paige*, 302). The trustees in repairing and altering the church have exercised a lawful power conferred upon them by statute. The alteration of the church by the trustees, as appears from the evidence, was a judicious and proper improvement, beneficial to the members of the congregation, and was made in accordance with a vote of the congregation. The interest of a pewholder in his pew is a qualified interest. It is limited to its use during divine worship. It is limited too as to time. If the house is burnt or destroyed by time, the right is gone (5 *Cow.* 496). The pewholder has no title to the soil on which the edifice stands, nor to the edifice itself. The building and soil are the property of the corporation; and the seizin and possession of the same are in the trustees. Whenever it is necessary or proper, the trustees may take down the old edifice and rebuild on the same spot, or elsewhere, and may alter the form and shape of the building for the purpose of making it more convenient and adapting it to the increased wants of the society. And in doing this they can, for useful purposes and to carry out the contem-

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plated improvement, take down and remove the pews of the pewholders. The property of the pewholders in their pews is necessarily subject to the right of the trustees to alter and improve the internal arrangement of the church as the good of the society may require. And if in doing this, the pews are necessarily destroyed, the pewholders can not maintain either trespass or ejectment against the trustees. The pewholder has a remedy where his pew is destroyed for convenience only; or where the trustees have been guilty of a wanton and malicious abuse of their power in destroying his pew. In such cases his remedy and his only remedy is an action to recover damages by way of an indemnity for the loss of his pew. If the church edifice is so far decayed as to be unfit for use as a house of public worship, and it is for that reason taken down, the pewholder's right to his pew is gone and he is not entitled to any indemnity for its loss (9 *John.* 147, 156; 2 *Edw. Ch. R.* 608; 17 *Mass.* 434; 1 *Pick.* 102; 3 *Pick.* 344; 7 *Pick.* 137; 3d *ed. Ch. R.* 138, 9; *Bronson vs. St. Peters Church*, vol. 7, No. 12, *N. Y. Legal Observer*, per MAYNARD, J). The defendants are at liberty to amend their answer so as to conform it to the proof, if they think proper to do so.

Judgment must be entered for the defendants.

COURT OF APPEALS.

DRESSER Appellant agt. BROOKS, Respondent.

Service of notice of justification of sureties, in an undertaking, when made by mail, should be double time, ten days.

If such service would carry the time of justification beyond the ten days required by § 341 of the Code, it should either be made personally, or a judge's order obtained extending the time.

The *non payment* of costs of the dismissal of an appeal, is ground for staying proceedings on a second appeal in the same cause, until such costs are paid.

On the 7th of June the respondent excepted to the sufficiency of the sureties in the undertaking, and served notice of the exception by mail. The notice was received by the appellant on the 10th, who on the same day gave notice by mail that the sureties would justify on the 17th, and the sureties did justify on

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that day. The respondent did not attend the justification, because the notice of justifying, being served by mail, should have been a notice of ten days (*Code*, § 341, 412). A former appeal in the cause had been dismissed with costs (*Dresser v. Brooks*, 2 *Comst.* 559); and the costs had not been paid.

H. DEMO, for the respondent, moved to dismiss the appeal, because there had been no regular justification of the sureties. If the appeal should not be dismissed, he asked a stay of proceedings on the appeal until the costs of the former appeal shall be paid. He cited 1 *John. Cas.* 247; 3 *Cow.* 380; 4 *Wend.* 216.

H. DRESSER, *Contra*, said the sureties were bound to justify within ten days after the exception (*Code*, § 341); and in his notice of justifying he had given all the time (seven days) that remained to him after notice of the exception was received.

BRONSON, Ch. J.—As the notice of justifying was served by mail, it should have been double time or ten days. If the appellant had not sufficient time to give regular notice by mail, he should either have caused personal service to be made, or should have obtained a judge's order enlarging the time. As the notice was irregular, the justification amounts to nothing. But there is ground for granting relief, and the appeal will not be dismissed if the sureties justify within thirty days, and the appellant pays the costs of the motion.

If the sureties justify, all further proceedings on the appeal should be stayed until the costs of the former appeal are paid. Two successive appeals in the same case, like two actions for the same cause, tend to vexation; and we think this branch of the motion should be granted.

Ordered that the appeal be dismissed with costs, unless the sureties in the undertaking justify, upon regular notice, within thirty days, and the appellant pays ten dollars costs of the motion. If the sureties justify, then all further proceedings on the appeal are stayed until the costs of the former appeal are paid; and if they are not paid within sixty days from this time, the respondent may enter an order dismissing the present appeal, for want of prosecution, with costs.

COURT OF APPEALS.

Decisions Sept. Term, 1848, at the Capitol in the City of Albany.

[Continued from page 40, and concluded.]

JOHN CHRETIEN, plaintiff in error, vs. JOHN DONEY and others, defendants in error. *Judgment of restitution reversed, and as to all the rest, judgment affirmed without costs in this Court.* R. GERMAIN and N. BENNETT for plaintiff in error; J. B. LATHROP and H. SEYMOUR JR. for defendants in error.

This case involved the construction of a clause in a lease for a term of years. And this principle was settled in the decision to wit: "Where the landlord obtains possession of the demised premises by summary proceedings which are reversed in the Supreme Court upon *certiorari*, that court should not award restitution to the tenant, if the term has expired before the judgment of reversal is rendered." *Reported, 1 Comstock, 419*

EBENEZER WISWALL, plaintiff in error, agt. LEVINUS A. LANSING, defendant in error. *Judgment affirmed.* D. BUEL JR. for plaintiff in error; JOHN K. PORTER for defendant in error.

This was an action for obstructing a way. It was held, among other questions, that a devise of land to which a right of way is appurtenant, will pass the easement to the devisee, although it be not particularly specified in the will

Also that twenty years uninterrupted and unqualified enjoyment of a way across the lands of another, is decisive evidence of a grant of the right of way.

Other questions in relation to the pleadings and exceptions in the case were decided. *Reported, 5 Denio, 213.*

PHILIP SLADE, appellant, agt. PERRY WARREN JR. et al., respondents. *Decree affirmed.* SAMUEL STEVENS for appellant; D. BUEL JR. for respondents.

This was a case where a mortgagor conveyed his equity of redemption to trustees for the benefit of his creditors, who sold the premises at auction. A portion was sold to V. free from incum-

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brances; the remainder to S. chargeable with the mortgage; who subsequently sold to F. and N. a small portion of his purchase. On a bill of foreclosure filed against the mortgagor and the purchasers, *held*, that the premises held by S. should be first sold, to pay the mortgage debt and costs. Secondly, the costs of V., and thirdly, the costs of F. and N. in defending. But that S. was not chargeable *personally* with the costs of V. In case of a deficiency, F. and N's portion be sold first; next V's. *Reported*, 2 Barb. S. C. R. 13.

JAMES STEWART, plaintiff in error, agt. MYNARD DEYOE, defendant in error. *Judgment affirmed*. JUDIAH ELLSWORTH for plaintiff in error; A. BOCKES for defendant in error.

This was an action of trespass committed by defendant's (Stewart) cattle upon the plaintiff's (Deyoe) land. It appeared that the cattle passed over a partition fence, which had been divided for each party to erect and maintain; and that both divisions were out of repair; and it did not appear from the evidence which part the cattle passed over. *Held*, that the plaintiff was entitled to recover. The defendant, to excuse himself, was bound to show that the cattle passed over that portion of the fence which the plaintiff was required to maintain. *Reported*, 4 Denio, 101.

JOSIAH L. DOW, plaintiff in error, agt. JONATHAN KENT, defendant in error. *Judgment affirmed*. JOHN VAN BUREN for plaintiff in error; M. SCHOONMAKER for defendant in error

This was an action of trespass commenced in a Justice's Court by Dow against Kent, for alleged injuries to the plaintiff's posts, fences, sidewalk and ground, adjoining the public highway; in plowing and scraping away the ground, &c.; in the village of Milton, Ulster county. The defendant pleaded the general issue, and gave notice (in substance) that he acted as overseer of the highway, and that whatever was done in the premises was done by virtue of his office, and was what the law required to be done.

On the trial, the plaintiff, was allowed, after objection, to give evidence that the work done by defendant, had not been done in the manner best adapted to the object in view; that turnpiking

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the road in front of plaintiff's land was not the best way to improve it; and that the sluice made was not necessary. Also, that defendant's fence was nearer the road than the church fence on the south, adjoining.

Judgment was rendered for the plaintiff before the justice (jury trial). On certiorari the Ulster Common Pleas affirmed the judgment. On writ of error to the Supreme Court, the judgment of the Common Pleas was reversed. BEARDSLEY, J. said "that in order to recover, the plaintiff was bound to prove that such trespass had been committed by the defendant. But this could not be done by showing that turnpiking the road was not the best way of improving it, or that the defendant's fence was out of position. Those were matters quite foreign to the case in hand. They were calculated to carry the jury away from the question before them, and were on no principle admissible as evidence in the case. On this ground, without going further, the judgment should be reversed." *Not reported.*

GEORGE BURR, plaintiff in error, agt. JOHN R. WOOD, defendant in error. *Judgment affirmed.* M. T. REYNOLDS for plaintiff in error; M. SCHOONMAKER for defendant in error.

This was an action of trover brought by Wood in a Justice's Court against Burr for levying upon and taking a two horse harness. It was proved that the harness belonged to the plaintiff and was loaned to one Smith; and Smith left it in the care of one Lefever; and while hanging in a shop belonging to Lefever was levied upon by Burr, by virtue of an execution against Smith. Burr did not take the harness out of the shop, but took it from the place where it hung and put it into a box in the shop with other property he had levied upon. It appeared from the testimony that the harness, shortly after the levy, was removed from the shop; and some testimony to show that it was taken to the garret of Lefever's house. Smith and Lefever resided in the same house. Smith was a witness on the trial, and refused to answer the question, "Has any one taken the harness out of the shop?" as having a tendency to criminate himself. After the testimony was closed and the summing up had commenced by defendant's counsel, de-

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fendant offered in evidence an execution against Smith in favor of one Dubois, to show that previously a set of harness of Smith's had been levied upon and the levy still retained, as evidence to justify the defendant Burr in making the levy in this case. The justice refused the evidence on the ground that it was offered too late.

Judgment was rendered for the plaintiff for \$10 damages and \$2.40 costs. The Ulster Common Pleas, on certiorari, reversed the judgment of the justice; and the Supreme Court (January term, 1846), on writ of error, reversed the judgment of the Common Pleas and affirmed that of the justice. "PER CURIAM. The defendant levied upon the harness, took it down from where it hung, and put it in a box with other property on which he had levied. What has since become of the property does not appear. The dominion which the defendant exercised over the property was enough to enable the plaintiff to maintain an action.

Whether the justice should receive further evidence after the testimony had been closed, and the summing up had been commenced, was a question addressed to his discretion. And besides, if the execution against Smith was received, it made out no justification for taking the plaintiff's property.

The witness Smith, was not bound to criminate himself. All that remains of the case were questions of fact. The judgment of the justice should not have been reversed." *Not reported.*

GERRIT I. HOUGHTALING, plaintiff in error, agt. GEORGE W. KELDERHOUSE, defendant in error. *Judgment affirmed.* HENRY G. WHEATON for plaintiff in error; R. W. PECKHAM for defendant in error.

This was a case which decided that in an action for slander, it is not competent for the plaintiff to introduce evidence of his good character, in reply to evidence introduced by the defendant, tending to prove the truth of the charge. *Reported, 1 Comstock, 530.*

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ONTARIO COUNTY COURT.

PROUTY, respondent, agt. PROUTY, appellant. •

Landlord and Tenant.

Tenants *from year to year* may be removed by "summary proceedings," under the landlord and tenant acts of 1830 and 1849, notwithstanding the omission from those acts of the phrase "from year to year"—which was employed in the statute of 1820.

Such a tenant is included, in the term "*Tenant at Will*" as used in the statutes of '30 and '49, and may be summarily removed upon *one month's* notice to quit *terminating with the year*.

The affidavit, on which the summons issues, should state that the tenant is holding over "*without the permission of his landlord*." If it do not, and the objection is taken at the return of the summons and overruled, it is error, for which the proceedings will be reversed.

The reduction of the term for which *parol* leases may be made, from *three years to one*, had no legal effect upon estates "*from year to year*."

WORDEN & CHEESEBRO, *for Respondent.*J. N. WHITING and A. T. KNOX, *for Appellant.*

MARK H. SIBLEY, *County Judge*.—This case is before the court on appeal under the act of 1849 (*page 291-2, of the laws of that year*), from the judgment of Justice FOLGER, rendered, on verdict, against the appellant, as a tenant holding over after the expiration of his term without the permission of the respondent, his landlord.

On the return day of the summons the appellant appeared before the justice and objected to the sufficiency of the affidavit on which it was issued, on the following grounds:

1st. That it does not bring the tenant within any of the subdivisions of § 28 of the Landlord and Tenant act.

2d. That it presents the case of a tenancy "*from year to year*," and does not show that the tenant has had six months notice to quit.

3d. That it does not show that the tenant was holding over without the permission of his landlord.

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These objections were severally overruled by the justice.

Upon the 2d objection he held that the appellant was a tenant from year to year; that as such tenant he would have been entitled to six months notice to quit *before ejectment*; but, that no notice to quit was necessary before summary proceedings for removal under our Landlord and Tenant acts; and that the tenant was liable to be removed under the 1st subdivision of the 28th section, as a tenant holding over after the expiration of his term.

After these decisions were announced, the tenant put in a counter affidavit, and the case went to a jury upon proofs, under the charge of the court, which was in accordance with these preliminary rulings.

This tenant took possession on the 1st day of May 1835, under a *parol demise*, for an indefinite period, at an *annual rent*, payable in quarter-yearly instalments, and continued to hold, by himself, his sub-tenant and assigns, to the 1st day of May 1850, when, he being again in possession, the landlord demanded a surrender and on the following day instituted these proceedings.

The relation of the appellant under such a demise and continued occupation was clearly that of a tenant from year to year, as defined by all writers who have treated of that particular estate. As such tenant he was entitled, by the well settled principles of the common law, to six months notice before his estate could be terminated. For the appellant it is insisted, that such an estate is not within the terms employed in the Revised Statutes or the statute of 49: or, if within those acts, that *six months* notice to quit was necessary to terminate it; and that until the ending of such notice the tenant could not be "holding over after the expiration of his term."

The questions to be decided are,

1st. Is a tenant from year to year subject to summary removal under our Landlord and Tenant acts?

2d. If so is he entitled to any and what notice to quit before such proceedings can be instituted?

3d. What is the effect of omitting from the affidavit on which the summons is granted, the averment that the tenant is at the

time of the application holding over "*without the permission of the landlord?*"

The questions thus presented are new and of great practical importance. I am required to review them with all the care which these considerations and the rights of the parties impose. It was my wish to dispose of the case at the term at which it was argued; but time did not then allow me to give to it that thorough investigation which I desired.

By our first statute allowing summary proceedings for the removal of tenants (*Statute of 1820, p. 176, § 1*), such proceedings are authorized against "tenants or lessees at will, or at sufferance, or for part of a year, or for one or more years, or from year to year."

The Revised Statutes of 1830 (*2d vol. 3d ed. p. 603, § 28*) and the statute of 1849, omit the phrase "*from year to year.*" No allusion to this change is to be found in the Revisers' notes, or in any of the cases cited on the argument.

The counsel for the tenant argue that by omitting those words from the statute of 1830, the revisers and the legislature intended to exclude from the operation of the act the estate described by them.

On the other hand, it is insisted that this phrase was omitted because that which was previously an estate from year to year was converted by the Revised Statutes into a tenancy for a single year—terminating by legal implication at the end of each year. The position of the respondent's counsel on this point, fully stated, is this:

That, although prior to 1830 (when terms for *three years* might be created by parol), the appellant's estate would have been from year to year; yet that, since the Revised Statutes have made void all leases by parol for more than *one year*, such limitation necessarily abolished the estate from year to year as known to the common law; because such an estate could only be created by convention, expressed or implied, between the parties, for a term exceeding one year; that, as the continuance of the tenant beyond the stipulated term always implied a renewal of the original

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contract; and the statute of 1830 not allowing parties to lease by parol for more than one year; the law will not imply an agreement which the parties can not lawfully make, but that it does imply a lawful agreement, i. e., for one year certain, and so on for each year of occupancy—limiting the term, by implication, to the current year and making it expire with such year. That, as a consequence of this change in the law, the tenant, who enters under a parol demise for more than one year or for an indefinite period, must be deemed to hold over after the expiration of each year in like manner as if he had entered under a parol demise for one year only and held over after the close of that year without the consent of his landlord expressed or implied. That therefore, the appellant in this case was a tenant for one year, and not entitled to any notice to quit, being within the phrase, retained in the Revised Statutes, a tenant "*for one or more years.*"

It is further insisted on the part of the respondent that the abrogation, thus effected, of the common law estate from year to year, led the Revisers to omit that estate from the Landlord and Tenant act as one no longer known to our laws.

These views have been very earnestly and ably enforced by the counsel for the landlord, and authorities have been cited to sustain them. It becomes necessary to examine these positions carefully; for, if they are sound, they are conclusive against the first and second points taken by the appellant, and settle two very practical and important questions.

In the first place it may be remarked that the Revisers did not recommend the changing of the term for which parol leases may be made from three years to one. The statute of frauds as submitted to the legislature retained the old term of three years. The legislature changed it to one. It would seem, therefore, not to have been the purpose of the Revisers to effect the change contended for. Still it may have been wrought out whether the revisers or the legislature intended it or not. But we must not adopt without full consideration a construction which will work so important a change in our jurisprudence. This description of tenancy is

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perhaps one of the most common and convenient among men, and it will continue to exist in fact, whatever changes may be made by the legislature in respect to the privileges belonging to it.

At an early period in the history of English jurisprudence—so long ago as the Year Books—the wisdom of the common law, “*in order to avoid so great injustice as would be the turning out of a tenant from year to year suddenly, or upon short notice, as a strict tenant at will might have been turned out, attached to such an estate the right to six months notice to quit, terminating with the year.*” This right has been preserved and has constituted the distinguishing characteristic of such a tenancy in England and in this state, certainly down to the enactment of our statute for summary removal of tenants. It is a rule moreover founded in justice and reason and should not be abrogated by inference or implication.

Chancellor Kent, treating “Of Estates at Will,” in the 4th vol. of his Commentaries (p. 114), says: The resolutions of the courts, turning the old “estates at will into estates from year to year, with the right on each side of notice to quit, are founded in equity and sound policy, as they put an end to precarious estates and to the abuses of discretion.”

The same learned commentator remarks (*ib. pp. 115–16*), that the Roman law, like the English, was disposed as much as possible, and upon the same principles of equity, to construe tenancy at will to a holding from year to year, and to give to the tenant the reasonable right of notice to quit; that, “when the sages at Westminster were called to examine the same doctrines, with a strong if not equally enlightened sense of justice, they were led to form similar conclusions, even though they had to contend in the earlier period of the English law, when the doctrine was first introduced, with the overbearing claims of the feudal aristocracy and the scrupulously technical rules of the common law.”

Upon the case of *Ellis vs. Paige* reported in 2 *Pick. (Mass.) R. p. 71*, Mr. Kent, in a note at page 113 of the 4th volume of his Commentaries, uses the following language: “The opinion of Judge Putnam contains a full and broad view of the whole

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ancient and modern law upon the subject, and he established, by authority and illustration, the necessity of reasonable notice to quit in all cases of uncertain tenancy, whether under the name of tenancies from year to year or at will. He showed that the doctrine was grounded on the immutable principles of justice and the common law; and was introduced for the advancement of agriculture and the maintenance of justice, and to prevent the mischievous effects of a capricious and unreasonable determination of the estate."

It is contended by the respondent's counsel that this ancient and time honored right of notice to a tenant from year to year, is taken away by the Revised Statutes, and that the estate itself is in effect abolished, as the necessary legal consequences of changing the term for which parol leases may be created, from three years to one.

But I apprehend that it was never essential to a tenancy from year to year that the original demise should be for more than one year. That estate is not in this case, and need not be in any case, founded upon express contract; but may grow out of the subsequent acts or omissions of the parties. The relation arises from the circumstances in which they place themselves to each other during the occupancy. Out of these circumstances the common law, without conventional arrangements, created this particular description of estate and attached to it the just and reasonable right of six months notice to quit before it could be terminated. Such is the doctrine of the common law, whether the tenant entered under an agreement for an indefinite period, or for one or more years, and held over with the permission of his landlord, and, in some cases, when the original entry was without privity between the parties.

I proceed to extract, without comment, the doctrine of some leading cases in England and in this country, bearing upon these points:

1st Term Rep. 159.—"Notice is necessary in all cases where the duration of the tenant's term or interest is not *fixed and limited by previous agreement*, as if he hold from year to year as

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long as both parties can agree; for, in that case, neither party can determine the tenancy without giving notice to the other."

3d *ib.*, 13.—"The tenancy from year to year succeeded to the old tenancy at will, which was attended with many inconveniences, and, in order to obviate them, the courts very early raised an *implied contract for a year*, but added that the tenant could not be removed at the end of the year without receiving six months notice" (*See also 2d Crabb's Law of Real Property*, p. 269, § 1570.)

Esp. Rep. 265.—"If there be a lease for a year certain, and, by consent of both parties, the tenant continue in the possession afterwards, the law implies a tacit renovation of the contract; the parties are supposed to renew the old agreement, which was for one year. *But then*, it is necessary, if either party should be inclined to change his mind, that he should give the other party half a year's notice before the expiration of the next or any following year." (*See also 1st T. R.* 85; 8 *ib.* 3; *Woodfall's L. & T.* 164; *1st Cruise on Real Property*, 84; *2d Crabb L. of R. P.* § 1306, 1518, 1566, 7, 8, and 9.

5 *Term Rep.* 47.—"Though a lease be void by the Statute of *Frauds*, as to the duration of the term, the tenant holds under the terms of the lease in other respects, and can only put an end to the tenancy at the expiration of the year."

1st *Cruise on Real Property*; p. 277, §29.—"Where an agreement for a longer term than three years is made by parol which is void as to the duration of the term, *there is a tenancy from year to year*, regulated in every other respect by the agreement."

Morehead vs. Watkins, 5 *B. Monroe Rep.* p. 228 decides that though by the statute of Kentucky no action can be maintained on a verbal lease for *more than one year* yet, if the lessee occupies under such lease, he is entitled to six months notice to quit.

The following cases decided by the courts of this state, are equally adverse to the doctrine contended for by the respondent's counsel:

In *Jackson vs. Salmon* (4 *Wend. R.* 327), Ch. J. SAVAGE remarked: "The only question is, whether the defendant was

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entitled to notice to quit. He had hired the premises for *one year* and continued in possession after that period. He was tenant from year to year and entitled to notice.

The doctrine in *Bradley vs. Covell* (4 *Cow. Rep.* 349), is that a tenant entering for an unlimited period, is a tenant from year to year, and entitled to notice; that a continued possession, or other circumstances, convert a tenancy at will into "*a tenancy at will from year to year*," and imposes the necessity of giving six months notice." (See also 1 *John. R.* 325; 8 *Cowen*, 230; 11 *Wend.* 619.

It has been repeatedly held by the courts of this state, *before* the statute of 1830, that a tenant *under a parol demise* who continued in possession beyond the period of *three years*, was a tenant from year to year, and entitled to notice to quit. As in *Schuyler vs. Leggett* (2 *Cowen*, 660). "Though a parol demise for seven years be void by the statute of frauds, yet it enures as a tenancy from year to year, if the tenant enter and hold under it, and it will regulate the terms of the tenancy in all other respects."

Prindle vs. Anderson (19 *Wend. R.* 391, reviewed by the Court for the Correction of Errors, 23d *ib.* 616), was a case of a parol demise made *subsequent to the statute of 1830*, and yet the court held that *the circumstances* should work a yearly or monthly tenancy and that such a tenant was entitled to notice to quit.

This estate from year to year, is distinctly recognized as belonging to a tenant who enters under a *parol demise for more than one year* in the late case of *Wibber vs. Sherman* (3 *Hill R.* 25), and still later, in *Conway vs. Starkweather* (1 *Denio.* 114), Ch. J. BRONSON says: "When a tenant under a demise *for a year or more* holds over after the end of his term without any new agreement of his landlord, he may be treated as a tenant from year to year, and in all other respects as holding according to the terms of the original lease. He will be a tenant if the landlord either receives or distrains for rent after the end of the *original term*; and when he neither says or does any thing, his acquiescence may perhaps be inferred from the mere lapse of time."

I am not able to perceive any connexion between the changes

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in the statute of frauds and the landlord and tenant act; and am constrained, by the force of the authorities referred to and upon principle to dissent from the positions of the counsel for the landlord in the case before me, and to hold that the court below (while correctly deciding that this tenant had an estate from year to year in the premises), erred in ruling that he was not entitled to *any* notice to quit.

I find myself equally unable to adopt the views presented, and urged with great force, by the counsel for the appellant, viz: 1st. That the omission of the phrase "from year to year," from the Revised Statutes and the statute of 1849, left the justice without jurisdiction in this case; or, 2d. That if such a tenant may now be removed by these summary proceedings, he must first have *six months* notice to quit.

It is not without some hesitation that I put the law of this case upon grounds not taken by the learned counsel on either side, and not even suggested by counsel or court in any of the cases which have arisen in this state under the landlord and tenant act since the revision of 1830. But, have reached the conclusion after much investigation and reflection, that it was not the intention of the legislature to leave tenancies from year to year out of the operation of that act, and that this description of estate is comprehended by the term "TENANT AT WILL," as used in the Revised Statutes and in the statute of '49.

An estate "from year to year," or what came to be so called, was originally an estate at will, strictly. But the courts, by a species of judicial legislation, founded on principles of equity and public policy, attached to such an estate the right to half a year's notice of the *will* of the landlord, or lessee, to terminate it. Still it remained an estate at will, qualified only by the new rule of notice which controlled the exercise of such will, in respect to the time when it might take effect, and the mode in which it should be manifested. Accordingly the ablest commentators and compilers, in England and in this country, treat of this description of tenancy under the head "*Of Estates at Will*," (*Cruise on Real Property*, p. 270; *Kent Com.* 4 vol. p. 110.)

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In *Parker vs. Constable* (3 *Wilson's Rep.* 25), CH. J. WILMOT remarked: "It has not been doubted of late years that half a year's notice to quit must be given to a tenant at will." The facts of this case are not given by the Reporter, yet it was doubtless that of a tenancy from year to year; for Mr. Crabb in his "Law of Real Property," (2 v., p. 268, § 1568), cites the same case in these words: "It has not been doubted of late years that half a year's notice to quit must be given to a tenant at will (that is an implied tenant from year to year), before the end of which an ejectment will not lie to turn him out of the farm."

At § 1565 the same author says that, "*prima facie*," all leases for uncertain terms create a tenancy at will."

Woodfall's L. & T. p. 165, (treating of tenancies from year to year) uses this language: "Half a year's notice to quit must be given to a tenant at will (that is a yearly tenant), or his executor, or an ejectment will not lie."

The Case in 2 Pick. (Mass.) R. p. 70, before cited, was a letting from month to month; yet it was held to be a tenancy at will.

In *Bradley vs. Covel* (8 *Cowen R.* 349), WOODWORTH, J., "a tenancy at will is held to be a tenancy from year to year, merely for the sake of a notice to quit;" and the courts of this country have in repeated instances used the phrase "tenant at will" and "tenant from year to year" indiscriminately. By a statute of this state (§ 1 of title 2; art. 1 ch. 1 of pt. 2 of the R. S. 2d vol. 3d. ed. p. 9), "Estates in lands are divided into estates of inheritance, estates for life, estates for years and estates at will and by sufferance."

Unless, therefore, the estate from year to year is embraced in one of these divisions it can not be any longer known to our laws. I do not perceive any legal foundation for ranging it under any other of the statutory divisions than that of an "Estate at will." Indeed a tenant from year to year is one holding such a relation to the owner of the premises that he has a legal right to occupy them from year to year *as long as they please*, but he must quit, at the end of any year, when the landlord manifests his *will* to that effect by the legal notice.

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At *common law* this notice was for half a year, terminating with the year. This the wisdom of its judges deemed but a reasonable notice to a lessee from year to year of a farm or a tenement, that he must turn out. But this common law right, was of course, subject to legislative control, which could abridge or take it away at pleasure. This power over the subject has been exerted by the legislature of this state in the enactment of § 7 of title 4th, ch. 1, p. 2 of the R. S. (2d vol. 3d ed. p. 30), in these words; "Wherever there is a tenancy at will, or by sufferance, created by a tenant's holding over his term, or otherwise, the same may be terminated by the landlord's giving one month's notice in writing to the tenant requiring him to remove therefrom."

The *wisdom* of the legislature has thus reduced the term of the old common law notice from half a year to one month.

The commissioners of the revision of 1830, with a view to the making notices to all descriptions of tenants at will or sufferance—"whether created by the tenant's holding over his term or otherwise"—uniform; and to get rid of the six months additional notice required by the decision in the case of *Bradley vs. Covel* (4 *Cowen*, 149), and deeming *three months* notice sufficient in all cases, submitted this section 7, with that term, to the legislature; but that body struck out "*three months*" and substituted "*one month*" (see the *Revisers' Notes* to §§ 7, 8, 9 and 10, 3d vol. 2d ed. p. 599). In this connection § 1, above cited (p. 9, 2v. R. S.), may be considered as bearing upon my position.

I conclude, therefore, that the phrase "from year to year," was omitted from the statute of 1830, because that particular description of estate was understood to be embraced by the term "*tenant at will*," and that estates described by that phrase may be terminated by a notice of not less than one month."

This section 7, and the 9th section of the same title, were undoubtedly adopted without due consideration; for supposing that they were intended to apply to tenancies from year to year, and giving to them a literal interpretation, they would enable a landlord to turn out the yearly tenant of his farm at *any time* during the year—even in seed or harvest time.

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I think that these sections may receive a construction more in accordance with the principles of reason and justice; and that it is not too liberal to suppose that, whilst it was the intention to abridge the term of the old notice, it was not the purpose to interfere with the well settled rules of the common law in respect to the time when such notice should *expire*; but to leave those rules still in force, so that the one month's notice required by the 7th section must, when given to a *tenant at will from year to year*, terminate with the year of the tenant's holding, if to a tenant from month to month, with the month, &c.; and that such tenant will not be holding over "*after the expiration of his term*" within the meaning of the landlord and tenant acts, until the expiration of such notice. To give to those sections the stringent construction which their language will allow, as being within legislative intention, would be to suppose a design to bring the tenantry of this state within the rigors of that feudal system from which, as we have seen, the old judges rescued the tenantry of England. Even with the more benign interpretation which I am disposed to give to these sections, they retain quite enough of the odor of feudality; for to turn out a husbandman who is cultivating a farm from year to year, upon only one month's notice, expiring with the year, is certainly sufficiently "*summary*" and may work great wrong and injury to the tenant. To turn him out without any notice whatever, as it is insisted by the respondent's counsel (on the authority of the cases in *8th Cow. and 11th Wend.*), may now be done, would be to restore in all its sternness, the old rule, against which the sages of the English common law successfully struggled.

The affidavit upon which the proceedings in the case before me are based, states that more than two month's notice to quit on the 1st May 1850, was served on the appellant.

To the sufficiency of this affidavit he took on the return of the summons, and before putting in his counter affidavit the objections stated at the head of this opinion. Upon those objections the justice decided that *no notice whatever* was necessary. In view of this decision the counter affidavit was interposed, and it

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does not deny, or take any notice of, this allegation in the landlord's affidavit. No proof was given on that point by either party, and it was wholly lost sight of in the subsequent proceedings (probably because the decision of the justice rendered it immaterial) and no allusion was made to this fact of notice by the counsel for either party on the argument before me.

If I could, under these circumstances, give to the respondent the benefit of this notice, without violating the principle of two analogous cases, I should be disposed to do it.

But there would remain an insurmountable difficulty in the way of sustaining the judgment of the court below. The affidavit on which the summons was issued, does not state that the tenant was holding over "*without the permission of his landlord.*"

The objection was distinctly taken by the appellant at the return of the summons; and the defect, in my judgment, is a fatal one.

The first subdivision of § 28 of the statute (2 R. S. 3d ed. p. 603), authorizes "summary proceedings" against a tenant, "where he shall hold over and continue in possession, of the demised premises, or any part thereof, after the expiration of his term, *without the permission of the landlord.*" The 29th section (*ib* p. 604), enables "any landlord," &c., "to make oath in writing of the *facts*, which according to the preceding section, authorize the removal of a tenant," &c. The next section directs that "on receiving *such* affidavit" the officer may issue his summons, &c. It is not merely the holding over after the expiration of his term which subjects a tenant to the summary remedies of the statute: another condition is superadded, viz, that such holding over shall be without the permission of the landlord.

This latter is one of those facts required to be set forth in the affidavit presented to the officer to bring the tenant into the condition which makes him a subject of summary proceedings, and to authorize the issuing of a summons.

These statutes, authorizing summary removal, being in derogation of the common law rights of tenants, are to be strictly construed; and the proceedings under them must conform in all respects to the requirements of the statutes.

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The summary *remedy* which they provide can be made effectual only in the *manner* prescribed. Courts will be liberal in the application of the intended remedy, but "when scanning the *proceedings* to attain that remedy they have been strict and rigid in exacting compliance with the requisitions of the statute." EDMONDS, J., (*Smith vs. Moffat*, 1 *Barb. S. C. Rep.* 67).

By COWEN, J., *Farrington vs. Morgan* (20 *Wend. Rep.* 207), "Summary proceedings are in general open to objection for technical omissions, imperfections or defects in the return, and proceedings under the landlord and tenant act, are not exceptions. They are not like proceedings in a justices's court, expressly required, *by statute*, to be liberally construed so far as form is concerned; but the magistrate must show a strict compliance with the statute at every step."

By BRONSON, J., *Hill vs. Stockings* (6 *Hill's Rep.* 317), "when one wishes to put another out of the possession of a dwelling or store upon an affidavit," &c., "it is not too much to require that he shall make out a plain case in the preliminary affidavit, especially as he is allowed to be his own witness. These summary proceedings must be carefully watched or they will be turned into the means of working injustice and oppression." (*See also* 9 *Wend. Rep.* 227; 1 *Hill*, 512; 8 *Cow.* 13).

In these and other reported cases, defects far less essential than that now under consideration have been held fatal; indeed some have been so considered which seem to be merely technical. But this does not partake of that character. The omission complained of is that of an essential and substantial fact, peculiarly within the knowledge of the landlord, and the statute intends to search his conscience in regard to it. It is as much of the substance of the statute as that other fact of "holding over after the expiration of his term," to which it is cumulative; and one portion of the requirement may as well be omitted as the other. It is not a fact to be presumed, or inferred, from the circumstances of the case, or from a short time elapsing between the demand and the making of the affidavit; for a moment of time would be sufficient to grant the permission; but the fact must be affirmatively and distinctly

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stated in the affidavit or it will not bring the tenant within the acts. This fact was distinctly stated in every affidavit which is given in the reported cases; and I have been able to find but one case which is not in entire harmony with the principles I have stated, viz: that of *Simpson vs. Rhinelander* (20 *Wend.* 103). The affidavit in that case was made by an *attorney* of the landlord and contained in express terms the averment of the holding over by the tenant "*without the permission of his landlord.*"

The tenant objected that this affidavit could not be legally made by an attorney. Justice COWEN held that it was well made and within the very language of the statute. It is true that, after thus deciding the point and disposing of the whole question, the judge let fall some suggestions to the effect that it is enough if the affidavit shows probable want of permission; and that if there was permission the proof of the fact is properly matter of defence to be set up by the tenant's affidavit and by proof to the jury; as he attempted to do in that case.

These suggestions were *obiter* merely, and can not be treated as authority on the point, opposed, as I think, they clearly are, to the plain import of the statute and the principles which have been uniformly applied in construing this statute and all other statutes providing special remedies in abridgment of common law rights. The affidavit must present a "plain case," within the terms of the statute before its power can be invoked. A probable or presumptive case is not enough. No one would contend for its sufficiency in respect to the holding over *after the expiration of the term*. And there is no ground of principle or authority for applying different rules to two essential requirements of the act. Nor is there any thing unreasonable or technical in requiring the landlord to state on oath whether the permission, which it might be difficult or impossible for the tenant to prove has been given.

I have never doubted that the plain terms of the act required that the want of permission should be distinctly averred in the preliminary affidavit, and I have in several instances refused to issue summons upon affidavits presented to me without such averment, until amended so as to embrace it.

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I am obliged, therefore, to *reverse* the judgment and proceedings in this case.

In deciding upon points so new, and of such every day application, without the aid of any direct adjudication upon those portions of this important statute which I am required to interpret, I can not but regret that my conclusions may not be reviewed in this case by my superiors. But, the legislature having seen fit to make my decision final between these parties, I have deemed it due to the bar of the county to state, very fully, the principles and reasons for my conclusions, that it may be the better seen, by the profession, whether they are sound or not.

SUPREME COURT.

NONES agt. THE HOPE MUTUAL LIFE INSURANCE COMPANY.

The objection that a summons, as the commencement of a suit, was not *properly served*, is not available in an *answer* or *demurrer*; but only on *motion*, to set the proceedings aside. The meaning of the language of the Code, allowing it to be set up as a defence that "the court has no jurisdiction of the person," is, that the person is *not subject to the jurisdiction of the court*, not that original process has been improperly served.

New York General Term, May 1850, before EDMONDS, EDWARDS and MITCHELL, Justices. On appeal from an order at the special term, before EDMONDS, J., striking out the answer as frivolous.

The facts sufficiently appear in the opinion of the court

By the Court, EDWARDS, J.—The defendant in this suit is a foreign corporation, created by the law of the state of Connecticut—this fact is set forth in the complaint.

It appears in the case that the defendant, after having given notice of appearance, and of the retainer of an attorney of this court, put in an answer in which it is alleged that the company is a foreign corporation, and that this suit was commenced by a summons and complaint served on the president of the company, in the city of New York, and not elsewhere; and that no other

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process had been served on the company, and that no warrant of attachment had been issued, or other proceedings taken against the company at the commencement of the suit; and that by reason thereof this court has not acquired jurisdiction over the defendant, and can not take cognizance of the subject of this suit.

The question presented to us is whether the matter thus set up on the part of the defendant is a sufficient answer to the complaint.

It is provided by section 144 of the Code of Procedure, that the defendant may demur to the complaint when it shall appear upon the face thereof that the court has no *jurisdiction of the person* of the defendant. And by section 147 it is provided that when such matter does not appear on the face of the complaint, the objection may be taken by answer. The Code also declares that all civil actions shall be commenced by the service of a summons (§ 127). It then directs in what manner such service may be made, and it provides that when the suit is against a corporation, the service shall be made by delivering a copy thereof to the president or other head of the corporation, secretary, cashier, or managing agent thereof (§ 134). And it further provides that when the person on whom the service is to be made, can not be found within this state, and that that fact shall appear by affidavit to the satisfaction of a court or judge thereof; and it shall in like manner appear that a cause of action exists against the defendant in respect to whom the service is to be made, such court or judge may grant an order that the service be made by the publication of a summons in certain enumerated cases, and amongst others, in a case where the defendant is a foreign corporation (§ 135).

The plaintiff contends that the service upon the president of the company in the city of New York was sufficient within the provisions of the statute. On the other hand it is contended by the defendant that as the company is a foreign corporation, the service should have been made in the manner pointed out in section 135.

With the view which we have taken of the case, we do not

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consider it necessary to express any opinion upon this question; for, assuming that the service was irregular, it does not follow that the facts set up in the answer furnish a sufficient defence to the complaint.

It will be observed that the answer is founded upon that section of the Code which provides that where the court has no jurisdiction of the person of the defendant, the objection may be taken by answer, but the objection taken here is not that the court has no jurisdiction of the person of the defendant, but that the summons had been irregularly served. There is no question that this court has jurisdiction over a foreign as well as a domestic corporation. The statute expressly gives it, and declares how process may be served upon it. It is true that, in one sense, the court never gets jurisdiction over a party, unless he is regularly served with process; that is, if process has been irregularly served, on that fact being made known to the court it will declare such service irregular, and will set aside all proceedings founded upon it. Thus, the Code provides in section 134, sub. 4, that in all other cases than those particularly mentioned therein, the summons shall be served by delivering a copy to the defendant personally. But suppose that in the case provided for in sub. 4, the copy of the summons, instead of being served personally, should be delivered at the defendant's house, or left at his place of business, will it be contended that such fact could be set up in an answer by way of objection to the complaint on the ground that the court has no jurisdiction of the person? and yet that would be a case precisely analogous to the one before us. The meaning of the clause "that the court has no jurisdiction of the person" is, that the person is not *subject to the jurisdiction* of the court, and not that the suit has not been regularly commenced. If the suit has not been regularly commenced, the defendant must relieve himself from such irregularity by motion.

With these views we are of opinion that the appeal should be dismissed, with leave, however, to the defendant to answer anew upon the merits within twenty days, upon payment of the costs and disbursements herein, subsequent to the answer.

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SUPREME COURT.

WALLACE & LA TOURETTE agt. EATON AND OTHERS.

A demurrer for nonjoinder of parties is well taken, where it appears that the court can not determine the controversy before it, without prejudice to the rights of others; nor by saving their rights (*Code*, § 122).

It seems, that section 122 of the *Code* is the controlling section in determining whether a demurrer, for defect of parties is well taken.

Where a complaint set up the recovery of a judgment against W. R. K. and that an execution had been returned *nulla bona*, and that the defendants and the debtor (W. R. K., who was not made a defendant) had colluded to defraud the plaintiffs and other creditors by a sale of goods, &c. And also that the debtor had made a general assignment to one D. L. for the benefit of creditors; that D. L. had neglected and refused to execute the trust created by such assignment, and praying that the sale by W. R. K. to defendants might be declared fraudulent, and that they pay over to the creditors of W. R. K., and that D. L. (who was made a defendant) might be discharged from proceeding any further under the assignment; and that a receiver be appointed, &c. *Held*, that W. R. K. was a necessary party to the action. The demurrer for defect of parties sustained.

This is a complaint in the nature of a bill in equity. The case comes before the court on a demurrer to the complaint. The complaint sets up in short the recovery of a judgment in the Supreme Court against one William R. Kelsey, on the 1st day of February 1849, for \$632.93, for goods sold and delivered.

It also sets forth the issuing of an execution to the sheriff of the proper county and a return of *nulla bona* thereon. It also alleges and charges that the said debtor and the defendants in this suit for the purpose of defrauding the creditors of the said Kelsey, and particularly the plaintiffs in this suit entered into and made a fraudulent transfer of about \$8000 worth of goods from the said Kelsey to the defendants in this suit, and that the defendants received the said goods without any consideration paid therefor and have sold them out, &c. And the plaintiffs ask that defendants account to them as judgment creditors.

The complaint also alleges that the said William R. Kelsey on or about the 29th February 1849, made a general assignment of all his property both real and personal to one Daniel Larned for

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the benefit of his creditors, giving no preference to one creditor over another.

That said Larned has neglected and refused to execute the trust created by said assignment. The plaintiffs allege also in the said complaint that this action is commenced for the benefit of all the creditors of the said Kelsey, who will contribute to defray the expenses thereof and prove their debts. The plaintiffs pray that the sale and transfer from Kelsey to Eaton & Spicer may be declared fraudulent and they required to account and pay over to the creditors of the said Kelsey; and that the defendant Daniel Larned may be discharged from proceeding any further under said assignment; and that a receiver of the property and effects of the said Kelsey may be appointed by this court with the usual power; and that the said Daniel Larned may be required to deliver over to such receiver all that he now holds under said assignment, and all the papers and vouchers, &c.; and that he account to the said receiver for his trust created by said assignment, &c.

The defendants Eaton & Spicer appear and demur to the complaint and assign several causes of demurrer.

The first assignment is for a defect of parties; because that the said William R. Kelsey is not made a party to this suit. The fifth is that Daniel Larned is improperly made a party; and the sixth is, that the plaintiffs are not entitled to maintain this action. That the action belongs to Daniel Larned, the assignee of Kelsey, and that he alone can maintain an action against the defendants Eaton & Spicer. The other assignments of demurrer are quite immaterial.

MASON, Justice.—The present Code of Procedure has adopted, with slight modifications, the rule in relation to parties which has heretofore obtained in Courts of Equity (see sections 111, 113, 118, 119, 122, 274). The 111th section provides “that the action shall be prosecuted in the name of the real party in interest, except in case of an action by an executor, administrator or trustee of an express trust, or a person expressly authorized by statute, without joining the person for whose benefit the suit

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is prosecuted." With these exceptions the suit must be prosecuted, in all cases in the name of the party in interest and the rule which has prevailed in equity, with the modifications above stated, may be very safely applied.

The 117th section enacts that all persons having an interest in the subject of the action and in obtaining the relief demanded, may be joined as plaintiffs, with the exception provided in that title. And the 118th section provides that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination and settlement of the question involved therein. And the 119th section enacts that of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants, unless the consent of one who should have been joined as plaintiff can not be obtained, then he may be made defendant by stating the reason thereof in the complaint. And the 122d section provides that the court may determine any controversy between the parties before it; when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy can not be had without the presence of other parties, the court should order them to be brought in. And the 274th section authorizes such judgments to be entered. And the 144th section allows the defendant to demur to the complaint, when it appears upon the face of the complaint that there is a defect of parties, plaintiff or defendant.

The commissioners of the Code in their report (*title 3, p. 123*), speaking of the provisions above stated, say, that "they have a threefold purpose in view:

First. To do away with the artificial distinctions existing in courts of law, and to require the real party in interest to appear in court as such.

Second. To require the presence of such parties as are necessary to make an end of the controversy; and

Third. To allow otherwise great latitude in respect to the number of parties who may be brought in.

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Again, they say, speaking of section 102, which is section 122 of the present Code, that it is for the interests of neither suitor nor the state that there should be several suits to settle one controversy, so long as one will do. They add, we have no hesitation in providing therefor as we have done by §102 (now §122), that where a complete determination of the controversy can not be had without the presence of parties, not at first brought before the court, the court may direct them to be made parties. They conclude by saying, "Having prescribed these rules, we have intended to leave suitors very much at liberty to choose whom to make defendants and whom to join as plaintiffs. No person can be affected by a judgment but a party, or one who claims under him. This rule will make the plaintiff bring in all the parties whom he wishes to affect. The judgment as we have seen by section 161 (now section 274), can be given for or against any one or more of the plaintiffs or defendants.

This will save the plaintiff from the hazard now encountered of bringing in too many parties, except that of paying costs."

It seems to me, therefore, as well from the reading of those various sections themselves, as from the expressed views of the commissioners in reporting them, that the 122d section of the Code is the controlling section in determining whether a demurrer for defect of parties is well taken or not. If the court can determine the controversy before it without prejudice to the rights of others; or by saving their rights, then a demurrer for non-joinder of such parties is not well taken. If on the contrary a complete determination of the controversy can not be had without the presence of other parties, then the demurrer is well taken, and the court should order them to be brought in by amendments of the pleadings; and which will generally be done by allowing the amendments on payment of costs.

In all other cases than the one above stated, the court will leave the plaintiff very much to his discretion as to bringing in others who might be affected by the judgment were they brought in; such is the construction put upon these statutes by *MONELL*, in his treatise on the practice, page 20.

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It becomes important, therefore, to inquire whether we can determine the controversy between these plaintiffs and defendants without prejudice to the rights of the said Kelsey, or by saving his rights. If we can this demurrer is not well taken for a defect of parties; and if we can not the demurrer is well taken.

I am inclined to think had the plaintiffs made Eaton & Spicer alone defendants, and sought no other relief in this suit than to have the transfer or sale of the property to the defendants, Eaton & Spicer by Kelsey, declared fraudulent, and that they be decreed to account for the property received by them, that the court might have granted the relief, without the necessity of bringing in Kelsey as a party; but they also ask to remove the defendant Larned for a breach of his trust duties as assignee; or for a total neglect of those duties, and to have a receiver appointed by the court with the usual powers of receivers in such cases. Now it seems to me that it would be an unheard of proceeding to be conducted *ex parte* or without any notice to the debtor, Kelsey, who is to be so seriously affected by such a proceeding.

He has a right to be heard upon the application to remove his chosen trustee and also upon the appointment of a receiver by this court who is to come in and take his place, or rather to take all of his property with the usual power of receivers in such cases.

This demurrer therefore is well taken for the first cause of demurrer assigned.

It is not, therefore necessary to consider the other questions raised by the demurrer; for there must be judgment for the defendants upon the demurrer, with leave to the plaintiffs to amend their complaint upon the payment of costs; and they may amend by bringing in the defendant Kelsey; or they may amend if they be so advised, by striking out the defendant Larned, and all that part of the complaint in relation to the assignment to him by Kelsey or such parts thereof as they may be advised. And in case this is done, the suit may be left to stand against the defendants, Eaton & Spicer alone, without bringing in Kelsey.

Tracy agt. Stone and two others.

SUPREME COURT.

TRACY agt. STONE AND TWO OTHERS.

Where in action for libel, two defendants defend by the same attorney and answer separately and verdict and judgment are given in their favor, but one bill of costs and one set of charges can be allowed on adjustment by the clerk.

Albany Special Term, August 1850. This was an action for libel. All the defendants appeared by one attorney, but two of them put in separate answers. On the trial of the cause, a verdict was rendered for the defendants. The defendants' attorney made out two separate and full bills of costs which were allowed on adjustment by the clerk, the one bill at \$157.37 and the other at \$117.25. The plaintiff moved for a readjustment of the costs.

H. G. WHEATON, *for Plaintiff.*

I. EDWARDS and S. STEVENS, *for Defendants.*

PARKER, Justice.—The clerk was wrong in allowing two bills of costs. Where the defendants appear by the same attorney, there can be but one bill of costs. Such was the rule under the late practice; though formerly, when the defendants necessarily pleaded separately and where different witnesses were needed, the specific allowances for such additional pleadings and for such different witnesses were taxable in the bill of costs. But under our present system, there being no specific compensation for an additional answer, no charge could be made for it. The defendants in this case could have but one bill of costs. In that they could include fees for all the witnesses who attended for either defendant and every other item allowed by the code, for an expense that either defendant had separately and necessarily incurred. But there could be but one set of charges for those services which are performed by the attorney or counsel. The witnesses were entitled to but single fees, though they may have attended to prove different facts for each defendant; and the disbursements could not be twice charged. It had been urged that the adjustment made by the clerk in this case was proper, because

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the compensation under the Code now belongs to the party and not to the attorney; that therefore the former practice was changed and each one of the successful parties defendant was entitled to a full and exclusive bill of costs. This reasoning would give costs to each of the successful defendants, as well where they unite, as where they separate, in their defence. In a suit against twenty persons, defending by one attorney and uniting in one answer, it would give to each defendant a separate and full bill of costs. Such a construction could not have been intended and can not be tolerated.

The statute now gives "to the prevailing party upon the judgment, certain sums by way of indemnity for his expenses in the action" (*Code* §303), and prescribes what such allowances shall be. It can not be supposed the defendants will pay their attorney double fees for attending circuit when the cause was not reached, or for any other service, because there are two defendants. Such charges are not necessary to their "indemnity."

There must be a readjustment of the costs before the clerk and it can best be done by making out a new bill and serving copy and notice of adjustment. Motion granted without costs.

SUPREME COURT.

THE PEOPLE agt. WILKES.

A defendant can not be legally tried upon an indictment for any offence *in his absence*, unless he has unequivocally waived his right to be present and *distinctly and expressly* authorized or substituted an attorney to appear for him. No *general* authority of attorney or counsel will authorize an appearance on such a trial. It is otherwise in civil actions.

Dutchess Oyer and Terminer, Oct. 1850. Motion for new trial on the ground that defendant was irregularly tried in his absence.

T. C. CAMPBELL, *Dist. Att'y for People.*

J. VAN BUREN, J. SMITH and Mr. SICKLES, *for Defendant.*

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By the Court, BARCULO, Justice.—The affidavits show that the defendant was indicted in March last for publishing a libel upon Mr. Jordan late attorney general of the state; that he appeared and put in a plea of not guilty, by Mr. Dean his attorney, of this county; that Mr. Dean was employed to watch and attend to the cause, and was present and assented to its being set down for the day on which it was tried. It further appears that the defendant had employed counsel in the city of New York to attend the trial, and that such counsel was prevented from attending by sickness, and that the counsel here was not put into possession of the information and means necessary to a defence.

The cause was brought to trial on the 24th September, in the absence of the defendant. Mr. Dean appeared for the defence and requested a postponement, but was not possessed of any affidavits to ground a motion upon. The cause therefore proceeded, and after the evidence had been given and the cause summed up by the respective counsel, the jury rendered a verdict of guilty. The defendant now swears that Mr. Dean was not authorized to appear for him on the trial *in his absence*.

I am entirely satisfied that Mr. Dean was employed by the defendant as his attorney and counsel in the cause generally; and that he was authorized to do all that he could fairly do to defend his client. No blame is, or can be, properly, attached to him for assuming any powers not delegated to him. I am also satisfied that no sufficient reason was shown to the court to postpone the trial of the cause, and that it was fairly and regularly conducted in all respects if the defendant was legally present. If, therefore, the case had been a civil one, or one in which the appearance of an ordinary attorney would suffice, there could be no plausible pretext assigned for disturbing the verdict.

But I am not satisfied that the statute has been complied with. On the contrary, the question not having been raised or suggested on the trial, its precise terms were overlooked. It was assumed that a defendant indicted for a misdemeanor would appear by attorney, and that the attorney present had the legal authority. Common practice sanctioned the assumption.

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The Revised Statutes, however, have changed the rule of the common law, which seemed to authorize the trial of the defendant in his absence, *if he had once appeared* (4 Black. 375). Our statute provides (2 R. S. 734, § 13), that no person indicted for any offence can be tried unless he be present either personally or by his attorney *duly authorized for that purpose*. This act is broad and explicit. It intends that the defendant shall be present, and not be tried in his absence, unless he elects to substitute some attorney, expressly, to appear for him. The provision is not satisfied with an *implied* authority. It requires something more than a general attorney in the cause. It is no part of the general or implied duty of an attorney to appear in the absence of the defendant on his trial. There must be a distinct and express authority over and above any general authority as attorney or counsel in the cause; there must be an *unequivocal* waiver of his right to be present on his trial before the defendant can legally be tried in his absence. Nothing short of this will satisfy the words "*duly authorized for that purpose*." No such authority existed in the present case. The verdict must, therefore, be set aside and a new trial ordered.

5 HOW 107—OVERRULED, 1 KEYES 228.

SUPREME COURT.

GAY agt. PAINE and PAINE.

It is not necessary, to charge an endorser, to aver a presentment and demand of the maker *at the place* specified in the note, in a complaint, under the Code.

Such a demand was, by authority, settled to be a condition precedent under the late practice, and the averment essential to a recovery. But section 162 of the Code has dispensed with the necessity of pleading the facts which constitute the performance of a condition precedent.

Herkimer Special Term, Sept. 1850. Demurrer to complaint against the indorsers of a promissory note, because "*it does not state facts sufficient to constitute a cause of action*." The note declared on was payable at the *Albany City Bank*, and the defect

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pointed out by the demurrer was in the averment of presentment and demand. They were laid in these words: "*When the said note became due, it was duly presented for payment to the defendant Thomas A. Paine, and payment thereof duly demanded.*"

H. NOLTON, *for the Demurrer.*

E. S. CAPRON, *Opposed.*

GRIMLEY, Justice.—It is settled in this state that in a suit against the maker, on a note payable at a particular place, it is not necessary to aver a presentment and demand at that place. If in fact the defendant had funds at the place, which would have been paid on demand, he must show that fact in defence, and that will relieve him from damages and costs, though not from the debt (see *Wolcott vs. Vansantford*, 17 *John. R.* 248; *Caldwell vs. Cassidy*, 8 *Cow. R.* 271; 3 *Wend. R.* 1; 17 *Mass.* 389; 13 *Peter's R.* 36).

But it is equally well settled, that in a suit against an indorser, the holder must allege and prove a presentment and demand at the place specified in the note for payment. In the 11th of *Wheaton's Rep.* 171, in the case of the *U. S. Bank vs. Smith*, the law is thus laid down by Mr. Justice THOMPSON, where he laid down the law as to the maker as above stated.

And in *Woolcott vs. Vansantford* (17 *J.* 256), Judge VAN NESS says, "it is conceded on all hands, and the proposition is too plain to be denied that in a suit to charge the indorsers of a note or bill, made payable at a particular place, a demand at such place is indispensably necessary."

Again, in the 5th *Denio*, 329, Justice WHITTLESEY declared, that when a note was payable at a particular bank, a statement in the notarial certificate of a demand of the cashier of the bank, was not enough; that the demand should be made at the bank. The same doctrine is laid down in *Woodworth vs. The Bank of America* (19 *John. Rep.* 419). The ground taken in the decision is that the demand of payment at the place indicated by the note is a *condition precedent* to the right of recovery against the indorser (17 *J. Rep.* 253)

Soverhill agt. Dickson.

If this demurrer, therefore, had arisen under the former system of practice, it must have been allowed. But the 162d section of the Code has dispensed with the necessity of pleading the facts which constitute the performance of a condition precedent. "It (the performance) may be stated generally, that the party duly performed the conditions," &c. The allegation that this note was "duly presented" and "duly demanded" is in pursuance of the Code, and allows the plaintiff to prove the facts which constitute the performance, though he has not specifically averred them in his complaint. This averment is not inconsistent with the idea that the note was presented to Thomas A. Paine, the maker of the note; for if the note was duly presented and duly demanded, he must have been at the bank at the time.

The demurrer must be overruled with costs and the defendants have twenty days to plead over.

SUPREME COURT.

SOVERHILL agt. DICKSON.

An action can not be brought against a *lunatic*, judicially declared such, without an application to the court.

The 134th section of the Code, 3d subdivision, provides for the service of a summons upon the committee and upon the defendant personally in such a case; but it is no authority upon the question of the creditor's right to commence an action.

The old practice should be pursued, by petition to the court for relief, or an application for leave to bring an action.

Ontario Special Term, Feb. 1850. The defendant in July 1848, was judicially declared a lunatic, and a committee of his person and estate duly appointed. The commission of lunacy continues in force. On the 13th November 1849, the plaintiff commenced this action without having obtained any leave of this court for that purpose. The action is for a money demand. The summons and complaint were served on the defendant and also on the committee in pursuance of subdivision 3 of § 134 of the Code of 1849.

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A petition is now presented by the committee praying that the complaint be set aside, on the ground that the action was commenced without the leave of the court previously obtained, or that the plaintiff be restrained from proceeding with the action.

S. K. WILLIAMS, *for the Petitioner.*

JAMES SMITH, *for Plaintiff.*

WELLES, Justice.—By the practice of the late Court of Chancery, the proper course for a party who had a claim against a lunatic or his estate, after office found, was to apply to that court by petition for the payment of the debt or for leave to bring a suit for the purpose of establishing the claim. If the chancellor or vice chancellor by whom the committee was appointed, was satisfied that the debt was justly due, the committee would be ordered to pay it out of the estate; or, if the claim was doubtful, the court would either have it settled by a reference to a master, or give the claimant permission to establish his claim by a suit at law or a bill in equity, as might be proper, under the particular circumstances of the case (In the matter of Hopper, a lunatic, 5 *Paige*, 489). An action at law against the lunatic, commenced without the permission of the Court of Chancery, would be restrained, and the plaintiff compelled to come there for justice. (In the matter of Heller, an idiot, 3d *Paige*, 199). A judgment at law, in an action commenced without such leave, would be of no avail to the plaintiff (In the matter of Heller, *supra*; Robertson vs. Lain, 19 *W. R.* 649). But the court of law in which the action was brought would not inquire whether such leave had been obtained, but left the plaintiff to prosecute it at his peril (Robertson vs. Lain, *supra*; Clark vs. Dunham, 4 *Denio*, 262; Sternburgh vs. Schoolcraft, 4 *Barb. S. C. R.* 153).

The foregoing are authorities also to show that a creditor might not interfere with the person or estate of a lunatic, idiot or habitual drunkard, for the collection of his debt, after the committee was appointed, without first obtaining leave of the court making the appointment. Such interference would be deemed a contempt of court, and would be punished accordingly; the com-

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mittee being regarded an officer of the court, charged with the care and custody of such person and estate, and entitled to the protection of the court.

I am not able to perceive that the new organization of the courts, or the new modes of proceeding therein, have essentially changed the law on the subject; all the reasons for the former practice continue. The 134th section of the Code directs who the summons shall be served upon in the several cases therein specified. The 3d subdivision of the section provides, where the action is against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs in consequence of habitual drunkenness, and for whom a committee has been appointed, that the summons shall be delivered to such committee and the defendant personally. It has been supposed that this authorized the commencement of the action at once, and without first applying for leave to prosecute. But this can not be so. It only provides who the summons shall be served upon, where an action is to be commenced. It is no authority on the question of the creditor's right to bring an action, one way or the other; an action may be directed where, upon petition to the court by the creditor, to have the committee pay his demand, the justice of his claim is rendered doubtful; or, if the creditor chooses to bring an action without leave first obtained, as he may do, and still be strictly regular, provided no application is made to restrain him; in such cases he must serve the summons as directed by the above section of the Code. On the argument of the motion, the plaintiff's counsel requested to be permitted to proceed in his action in case the court should deem his proceedings unauthorized. This, however, can not be done. If the case had not been brought to the notice of the court, the plaintiff might have proceeded to judgment without interruption, perhaps; but then his judgment would have been no evidence of the lunatic's indebtedness on an application to the court, for payment out of the estate. The attention of the court is now directed to the case, and no excuse is shown why the lunatic is prosecuted. The court has taken charge of his person and estate, and placed them in the care and custody

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of the committee, and is bound to protect him against unauthorized prosecutions. No injustice will be done the plaintiff. His course is to petition the court for relief, and if his claim is undisputed, the committee will be ordered to pay it. If disputed, so as to bring its justice seriously in question, a reference will be ordered, or the plaintiff be permitted to bring an action to determine its justice and extent.

The motion to restrain the plaintiff from proceeding further in the action is granted. But as there was some doubt whether the changed condition of the judiciary under the new constitution and subsequent legislation did not change the mode of proceeding in cases like the present, no costs are allowed to the petitioners as against the plaintiff.

SUPREME COURT.

HYDE, Receiver, agt. CONRAD, Administrator.

A *general* allegation in a demurrer to an answer, which sets up no bar or defence to the action, *that the facts stated therein do not constitute a defence*, is sufficient.

Broome County Special Term, Oct. 1850. This case came before the court on a demurrer to the answer; the grounds of which sufficiently appear in the opinion of the court.

H. R. MYGATT, *for Plaintiff.*

J. MARSH, *for Defendant.*

MASON, Justice.—The answer in this case does not set up any defence or bar to this action. Under the provisions of our Revised Statutes relative to the duties of executors and administrators, a plea of *plene administravit* is not a good plea (*Allen and wife vs. Bishop's executor's*, 25 *W. R.* 416; *Parker's executors vs. Gainer's administrators*, 17 *W. R.* 559, 561). It follows, therefore, that the plaintiff is entitled to judgment upon this demurrer unless the demurrer be deemed insufficient for not dis-

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tinctly specifying the grounds of objection to the answer. This question has arisen in several cases on demurrer to the complaint. In the case of Glenny agt. Hitchins and Horton (4 *How. Pr. R.* 98), Justice SILL decided that a general assignment that facts sufficient to constitute a cause of action are not stated in the complaint, and that the complaint may be true and yet the plaintiff not entitled to recover, was not good. This case, however, has not been followed. In the case of Durkee and others vs. The Saratoga and Washington R. R. Co. (4 *How. Pr. R.* 226), Justice WILLARD has distinctly overruled that case as well upon the authority of the case of De Witt vs. Swift & Waldon (3 *How. Pr. R.* 280), decided by Justice GRIDLEY as for the reasons assigned by him in his opinion in that case. If I were to decide this case, therefore, upon authority, I should hold this demurrer good. The allegation in the demurrer is, that the plaintiff demurs to the answer of the defendant for insufficiency, on the grounds that the facts therein stated are not sufficient to sustain the defence or to constitute a valid defence to the complaint; also that the answer is altogether inappropriate and useless; and also that it is not a bar to the plaintiff's action. If this were a demurrer to the complaint, I should regard it as sufficient, as I am of opinion that the view taken of the statute by Justices GRIDLEY and WILLARD in the cases above cited is correct. The case is still stronger when applied to the case of a demurrer to the answer. The 133d section of the Code, which gives the right to demur to the answer, is as follows: "The plaintiff may demur to the same for insufficiency, *stating in his demurrer the grounds thereof.*" While the 145th section, which prescribes what the demurrer to the complaint shall contain, reads as follows: "The demurrer shall *distinctly specify* the grounds of objection to the complaint," and then enacts that unless it do so, "it may be disregarded." It will be seen therefore, that while the statute prescribing the demurrer to the complaint says, "*it shall distinctly specify the grounds of objection to the complaint,*" that the statute allowing the demurrer to the answer says, that the "*plaintiff may demur to the same for insufficiency, stating in his demurrer the grounds*

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thereof," and that is all the statute requires. It seems to me, therefore, that the general allegation in the demurrer to the answer, that the facts stated therein do not constitute a defence, is sufficient. The plaintiff must have judgment upon this demurrer, but his judgment must be entered for future assets.

5 How. 114—FOLLOWED, 7 How. 108, 110.

SUPREME COURT.

TRIPP agt. DeBow.

Notice of appeal, should be served on the *attorney of record* in the court below, not on the party.

The service of such notice being a jurisdictional question, the party can take advantage of it at any time, if he has not appeared so as to give jurisdiction in the case.

Where such service was made upon the *party only* who had not appeared so as to give the court jurisdiction, *held*, that the appeal was a nullity.

General Term, June 1850. WELLES, SELDEN and JOHNSON, Justices. Appeal from an order at Ontario Special Term, July 1849. An order was made, upon motion at the special term, dismissing the appeal taken from a judgment in the County Court of Ontario county to this court, upon the ground that the appeal was not brought in conformity with the provisions of the Code. The notice of appeal was served upon the party instead of his attorney in the court below; and the justice held that the notice should have been served upon the attorney of record instead of the party, and that the statute not having been complied with, nor the error waived by an appearance, this court had acquired no jurisdiction and the appeal sought to be taken was a nullity.

It is insisted by the counsel for the appellant, that the notice of the appeal was properly served upon the party, and that for the purposes of the appeal, the respondent's attorney of record in the court below was not the attorney here.

By the Court, JOHNSON, Justice.—If the attorney of record below is not the attorney of the respondent in this court upon

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appeal upon whom notices of the proceedings are to be served, the decision was clearly wrong and the order dismissing the appeal must be reversed.

Is the attorney of record in the judgment the attorney in the action upon an appeal from the judgment within the meaning of §417 of the Code?

Formerly, undoubtedly, upon bringing a writ of error, the practice was to serve the notice upon the attorney of record of the defendant in error (*Lusk vs. Hastings*, 1 *Hill*, 662; *Sel. Pr.* 365; 2 *Tidd Pr.* 1068, *Am. ed.* of 1807). Upon a writ of error being brought it has been held that the defendant might change his attorney without making an application to the court (7 *Durn. & East*, 337; 2 *Tidd Pr.* 1141; 1 *id.* 94). This seems to imply that until changed the attorney of record was the attorney after writ of error. In *Grosvenor vs. Danforth* (16 *Mass.* 74), it was held that the attorney of record in an action in which an erroneous judgment had been rendered against his client might sue out a writ of error without any new authority, and that it was his duty to do so. The case of *United States vs. Curry* (6 *Howard U. S. Rep.* 106), was an appeal from the U. S. District Court for Louisiana. The notice was served upon the attorney of record; on motion to dismiss the appeal the attorney deposed that he was not at the time of the bringing of the appeal the attorney of the respondent, but had before that time been paid for his services and discharged from all duty as attorney or counsel, and had so informed the marshall at the time of the service. But the court, TANEY, Chief Justice, held that the service was nevertheless good according to the established practice; that while the name of the attorney continued upon the record, the adverse party had a right to treat him as the attorney; that otherwise it would often be impossible to serve a citation where the party was a non resident or his residence unknown.

The authority of the attorney of record continues in full force after judgment is perfected for many purposes. In *Dearborn vs. Dearborn* (15 *Mass.* 316), it was held that an attorney who undertook the collection of a debt was liable in an action for

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negligence in not suing out scire facias against the bail after judgment against the defendant upon his original retainer. So in our Court of Appeals in *Steward vs. Biddlecum* (2 *Comstock*, 103), it was held that an attorney with no other authority than his original retainer, after obtaining judgment, might demand of the debtor an assignment of his choses in action, and on refusal institute proceedings under the non imprisonment act.

The provision in the 2 *R. S.* 600, § 57, that notice of the bringing of a writ of error should be given to the party or his attorney before any judgment could be rendered, was a new provision, and the reason assigned by the Revisers was, that as the practice then stood there was no certainty of a party ever receiving any notice of a writ of error brought after execution was collected. That in the Court of Errors, the notice of the assignment of errors, which was the first real notice, might be served on the attorney of record or his agent. The attorney might be dead or out of the state, or if here, wholly indifferent to the suit after the lapse of years (*Report*, vol. 3, chap. 9, tit. 3, § 57, note). It seems clear from this view of the practice, not only before but since the Revised Statutes, that the attorney of record was always regarded as the attorney in the action for the purposes of notice of a writ of error or appeal until changed by the party and due notice given, which change might, however, be effected without any application to the court.

The Code has abolished writs of error and provided that judgments shall be reviewed by appeal only. The appeal is made by the service of a notice in writing on the adverse party and on the clerk with whom the judgment appealed from is entered (*Code*, § 327). This provision applies alike to appeals from inferior to superior courts and those from the special to the general terms of the Supreme Court. By § 417 where a party shall have an attorney in the action the service of papers shall be made upon the attorney instead of the party. This provision is found in chapter 11, entitled "notices and the service of papers." By § 418, it is provided that the provisions of chapter 11 shall not apply to the service of a summons or other process or of any paper to bring a party into contempt.

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Unless the notice of the appeal can be regarded as a process, it must, it seems to me, fall within the provisions of § 417, and be served upon the attorney in the action, where the party has one. This section is not in conflict with § 321. It is an additional provision and prescribes a particular mode of service of notice upon the adverse party where he has appeared in the action by an attorney. The service of notices and papers upon the attorney is, in a legal sense, a service upon the party himself, and it was perfectly competent for the legislature to prescribe any mode of service which should inform the party of the proceeding.

It is true this notice is in some cases a substitute for the writ of error, but it is a mere notice nevertheless in name and form, and it seems to me was so intended by the legislature.

This being so, it became a jurisdictional question; and the party has a right to take advantage of it at any time, provided he has not appeared and answered or proceeded in such a manner as to give the court thereby jurisdiction in the case. I think there has been no such appearance here and that it is not too late to take this objection. Order affirmed.

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Under the Code, the day of service should be excluded and the *first day of the court* included in the computation of time for service of notice of trial (ten days).

Hence, a notice of trial served on the 11th for the 21st, held good.

Washington Circuit, October 1850. Motion by the defendants to put the cause over the circuit. The notice of trial was served on the 11th of October for the 21st.

E. H. ROSEKRANS and A. D. WART, *for the Defendants*, insisted that the notice of trial was not served in time; that both the day of service and the first day of the court were to be excluded in the computation of time (5 *Wend.* 137; *Code*, § 407).

B. F. AGAN and A. L. McDUGALL, *for the Plaintiff, Contra.*

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PAIGE, Justice.—There is a difference in the phraseology of the Revised Statutes and the Code in relation to the service of notice of trial. The Revised Statutes declare that notice of trial shall be served at least fourteen days before *the first day* of the court, &c. (2 *Rev. Stat.* 410, § 7). The Code provides that either party at least ten days before the court may give notice of trial (*Code*, § 256). The Supreme Court in *Small vs. Edrick* (3 *Wend.* 137), decided that as the statute expressly excluded the first day of the court and the rules the day of service, there must be a notice of fourteen days exclusive of both these days. The rules were subsequently altered so as to allow the day of service of a notice of trial to be included in the computation.

The Code does not exclude the first day of the court from the computation. The notice of trial, by the Code, is to be given at least ten days before the court—not ten days before the first day of the court (10 *Wend.* 422). If, therefore, section 407 of the Code excludes from the computation of time, the day of the service of the notice of trial, the first day of the court may be included. Hence the notice of trial in this case, having been served on the 11th for the 21st of October, was served in time.

COURT OF APPEALS.

MASON, Appellant, agt. JONES AND OTHERS, Respondents.

Where judgment is pronounced in open court, holden by eight judges, without any dissent at the time, neither party can go behind such public act and attack the judgment on the ground of what may have taken place among the judges in their private consultations.

When a court has jurisdiction, its judgment is never void because it is erroneous in point of law.

It seems there is no doubt of the right of this court to order a judgment of affirmance where there is an equal division of opinion among the judges. Besides, the Code of 1849 (§ 14, which is not unconstitutional), expressly authorizes it.

June Term, 1850.

J. J. RINO, *for the Appellant*, moved to vacate the judgment of

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affirmance in this cause, which was rendered in May term 1849, and have the cause reheard.

D. LORD, *for the Respondents*, opposed the motion.

The ground of the motion is sufficiently stated in the opinion of the court, which was delivered by

BRONSON, Ch. J.—The appellant moves to vacate the judgment of affirmance which was rendered in May 1849, and have the cause reheard; and the motion rests on the allegation that the judges in their consultations out of court were equally divided in opinion—four being for the affirmance and four for the reversal of the decree—and in such a state of things, it is said, that no judgment could properly be rendered. The judgment was pronounced by a full court of eight judges, without any dissent at the time; and I am of opinion that neither party can go behind the public act of the court, and attack the judgment on the ground of what may have taken place among the judges in their private consultations. Whatever diversity of opinion there may have been among them in the conference room about either the law or the facts of the case, they all tacitly agreed that the judgment which was announced by the Chief Judge was the proper judgment to be rendered. If, in truth, there was an equal division of opinion among the judges in the conference room, and if a judgment of affirmance should not have been rendered in such a case, still the court thought otherwise and ordered such a judgment; and as there was no defect of jurisdiction, the error in point of law, could not affect the validity of the judgment. When a court has jurisdiction, its judgment is never void because it is erroneous in point of law

We are referred to cases where the courts have looked beyond the statute book, and inquired whether a supposed law had received the number of votes required by the constitution to give it validity (*The People vs. Purdy*, 2 *Hill*, 31; 4 *id.* 384, S. C.). But in that case the inquiry was concerning the public act of the members of the legislature in passing the law; and not about the private opinions, or what they may have thought or said on the subject when they were not acting in their legislative capacity

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Here, it is not denied that all of the judges concurred in the public act of ordering a judgment of affirmance; and there is no precedent for going behind the public act, and inquiring about the thoughts, declarations or opinions of the judges at another time.

It must not be inferred from what has been said, that I entertain a serious doubt about the right of the court to order a judgment of affirmance where there is an equal division of opinion among the judges. Whatever the rule may be in England, the Court of Errors in this state repeatedly rendered judgment of affirmance in such cases; and that course was expressly authorized by the legislature at the time this judgment was rendered (*Code of 1849*, § 14). However inexpedient it may have been to alter the rule as it had been established by the code of 1848 (§ 14), I see no ground for saying that the act of 1849 was unconstitutional. It did no more than restore the common law as it had been previously understood and acted on in this state. It was not a rule touching rights of property; but only a regulation of the course of judicial proceedings. We can not say that it was a law made for this particular case, which was then under advisement. The statute is general in its terms, applying alike to all cases under the like circumstances; and we can not inquire into the motive of the legislature in passing it, nor the influences which may have been exerted to procure the enactment.

We are all of opinion that the motion should be denied.

Motion denied.

SUPREME COURT.

DYCKMAN agt. McDONALD and DECKER.

All litigated trials, are difficult or extraordinary. And within the meaning of the Code (§308), a percentage should be allowed to the prevailing party. The application should be made when the cause is tried, or at least to the justice who tried it.

(*There are various decisions upon this question. See 3d and 4th vols. Howard's Pr. Rep.*)

Dutchess Special Term, Nov. 1850. This cause was tried at the last September circuit held in Westchester county by Justice McCoun and the plaintiff recovered \$250. Upon an affidavit showing that the cause was litigated and occupied two days in its trial, &c.; the plaintiff's counsel now moves for a per centage under the Code.

J. W. TOMPKINS, *for Plaintiff.*

C. FROST, *for Defendants.*

BARCULO, Justice.—The construction which I have always given to the 308th section of the Code differs in some respects from that put upon it by some of the other judges. The impossibility of adopting any uniform rule in determining what were "difficult or extraordinary cases," if each case is made to stand upon its own peculiar circumstances; as well as the uncertainty and inconvenience which must attend applications of this kind, led me to an examination of the subject which resulted in the conclusion that the object of the legislature was to empower the court to allow a per centage in all cases of *litigated trials*.

This opinion is founded,

1. Upon the expressed intention of the commissioners as contained in pages 206-7 of their report. They there declare that the losing party "ought to pay the expense of the litigation." and that the section in question is designed to furnish a "mode of indemnifying the successful party for his expenses in the suit."

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2. The intention of the commissioners is further manifested by the fact that the section as reported by them did not contain the words "difficult or extraordinary," but made the discretionary allowance depend upon a *trial being had*.

3. The specific allowances given by section 307 amount to the same sum on a simple inquest in an action upon a promissory note, as if the defendant litigated the right to recover in a trial of two or three days and at a great expense to the parties. But, if the object of the Code is to indemnify the prevailing party for his expenses, then in the case supposed, an extra allowance should be made in *consequence of the litigation*.

4. The second subdivision of section 308, by permitting an allowance in partition and foreclosure suits, &c., although "not difficult or extraordinary," shows that the discretionary power is conferred merely to enable the courts to indemnify the prevailing party for his expenses.

5. *All litigated cases are difficult*. There is no other reasonable definition which can be given to the word "difficult" consistent with the objects of the statute. It seems to be supposed by some that the party who seeks an allowance must show that it was only by great exertions that he was enabled to obtain a verdict. Those who take this view seem not to be aware of the inconsistencies into which they are wandering. For if this is the kind of difficulty meant, then it is only necessary for a party to show that his claim was unfounded, or at least doubtful, and that by his skill and ingenuity, or by the smartness of his counsel he has performed the *difficult* task of obtaining a verdict contrary to law or evidence. This would establish a difficult as well as extraordinary case in the *literal* acceptance, but not, I apprehend, in the *legal* acceptance; for this would be punishing the defeated party because he resisted an unjust or doubtful claim, while it permitted him to resist a well founded demand with impunity. And thus it would happen that the most difficult and most extraordinary cases would be precisely those in which the allowance would be most manifestly unjust. It would be a much more sensible construction to say, that, where the prevailing party has

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a claim *plainly and clearly just*, in the enforcement of which, he is put to extra trouble and expense, in consequence of the litigation of that claim by his antagonist, he is entitled to the benefit of the extra allowance.

Besides every litigated case is really more or less difficult; all who are familiar with trying causes at the circuit are aware of the contingencies and accidents upon which cases often turn, and that no case submitted to a jury can be said to be free from doubt before the verdict is rendered. To watch over and guide an important suit carefully and safely through the dangers and objections which a skilful opponent may interpose in its progress, is a responsible duty of counsel, and can not, in my judgment, be said to be entirely free from difficulty, however well founded the cause may be in its merits. Of course there are many degrees of difficulty, which require the exercise of the discretionary power in graduating the amount of per centage. But it is my practice uniformly to distinguish between mere inquests and litigated trials, by allowing some rate of per centage in the latter. I consider that the specific allowances given by section 307 are no more than an adequate compensation where there is no litigation at the trial, and that whenever the prevailing party has to employ counsel and attend a litigated trial he can not be indemnified for his expenses except by the allowance of a per centage.

If, therefore, this cause had been tried before me, I should, without hesitation, have made an allowance. But for the reasons above given the amount of that allowance would have depended upon circumstances which could only be learned at the time. This application should have been made at the circuit when the cause was tried; or, at all events, before the judge who held the circuit, unless some special reason for not doing so is shown. This, I think, was the object of the 86th rule, although somewhat ambiguously expressed by the use of the word "court" instead of "justice."

I shall therefore deny the motion without costs and without prejudice to an application to be made before Justice McCoun.

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SUPREME COURT.

COLVIN agt. BRAGDEN.

After demand by defendant, of a copy complaint under § 130 of the Code, the plaintiff should be allowed *twenty days* thereafter as a reasonable time for the service (*See the case of Littlefield agt. Murin*, 4 How. Pr. R. 306).

Montgomery Special Term, August 1850. This suit was commenced by summons unaccompanied by copy complaint. Defendant, in pursuance of section 130 of the Code, demanded a copy of the complaint. The plaintiff, twenty-two days after the demand, served a copy. But previous to this service (two days) defendant had prepared and served papers and notice of motion to dismiss the complaint under section 274 of the Code.

H. ADAMS, *for Motion.*T. B. MITCHELL, *Contra.*

PAIGE, Justice.—This motion involves the question of what is a reasonable time for the service of complaint after defendant has served a demand for same in pursuance of section 130 of the Code. As this is an unsettled question the different judges of this court will be found in conflict until some definite rule is established with the approval of the court in bench. It is a matter of opinion merely as to what is a reasonable time. The Code and standing rules have omitted to define the time. My views are not exactly in accordance with the opinion of Mr. Justice ALLEN in the case of *Littlefield agt. Murin* (4 How. Pr. R. 306). I think twenty days would be a reasonable time for the service of the complaint; but as the court have established no definite rule as to what is a reasonable time, the plaintiff in this case should not be charged with costs. The motion is properly made; but as the plaintiff does not desire to avoid service of the complaint I will give him five days to serve copy complaint, to which defendant may have the usual time to answer; no costs to be allowed to either party.

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SUPREME COURT.

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The writ of *ne exeat* is not abolished by the code, as a provisional remedy. In all essential particulars in its nature and effect and in the cases to which it is applicable, the *ne exeat* is unlike the arrest provided for in the Code (§ 178). It not being otherwise provided for in the Code, and not abolished by it in express terms, remains a provisional remedy which can not with propriety be denied to suitors when asked for in a proper case.

To authorize the issuing of a *ne exeat*, *facts* must be set out sufficiently, on which the court (or judge) can repose its belief. Mere fears and apprehensions of the party are insufficient.

Where the plaintiff expressed her fears that from circumstances which had come to her knowledge, the defendant would depart this state; that he would sell his property here and remove his means from this state, and would forcibly abduct her from this state and remove her to Pennsylvania in order to subject her to the jurisdiction of the courts of that state, where it was alleged the defendant had instituted proceedings for a divorce from the plaintiff, on the ground of adultery—*held*, that the mere fears expressed by the plaintiff in the absence of any reasons given, were insufficient to authorize the issuing of a *ne exeat*.

New York General Term, November 1850, before EDMONDS, Presiding J.; EDWARDS and MITCHELL, Justices. The complaint in this suit was filed by the wife to obtain a separation from her husband on the ground of abandonment.

It appeared that the defendant had separated from his wife, allowing her \$1500 a year for her support. That after the separation he had instituted proceedings in Pennsylvania to obtain a divorce from her on the ground of adultery. By the laws of that state it was necessary that the husband should have been a resident there for one year, and the complaint in this suit alleged that he was not at the commencement of the suit in Pennsylvania, and for a year preceding had not been a resident of that state, and that he pretended to be a resident there and had brought his suit there in order to deprive the plaintiff, who resided in this state, of the means of properly defending herself against the charges made against her.

The complaint also alleged that the defendant was the owner of a large property situated mostly in this state, and it expressed

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the fears of the plaintiff, from circumstances which had come to her knowledge, that the defendant would depart this state, that he would sell his property here and remove his means from this state, and would forcibly abduct her from this state and remove her to Pennsylvania in order to subject her to the jurisdiction of the courts of that state.

It therefore prayed an injunction, restraining the defendant from proceeding in his suit in Pennsylvania, on the ground that it was a fraud upon the plaintiff's right to be heard in the courts of this state; for a writ of *supplicavit*, commanding him not to molest her in her retreat in this state, and for a *ne exeat* restraining him from departing from the state, so that he might always be amenable to the courts of this state for any violation of the injunction. Those several writs were allowed by a judge at chambers and a motion was made at the special term to discharge the writ of *ne exeat*, which was granted.

The plaintiff appealed from that order.

C. O'CONOR, *for Plaintiff*.

J. VAN BUREN, *for Defendant*.

EDMONDS, *Presiding J.*—The counsel on both sides agreed that the writ of *ne exeat* is abolished by the Code. I certainly did not so understand the law at the time that I allowed the writ in this case, or I should have hesitated in directing it to issue; for the distinction on which the counsel for the plaintiff now rests his claim to the writ did not then occur to my mind, nor was it then suggested to me.

Until the decision in this case at the special term, it had not occurred to me that the writ had been abolished, but on the other hand, I have several times allowed it since the Code was enacted, supposing it to be one of those provisional remedies which had been saved to suitors by sections 244 and 468.

I confess that the note of the commissioners had not met my eye, and I have acted upon the subject in ignorance of their intention and without the light which I might doubtless have derived from their remarks.

And now that my attention is called to those remarks, I can not receive the avowal of their intention in recommending the law as conclusive evidence of the intention of the legislature in passing it, nor as any thing but very imperfect evidence of its real meaning.

It was frequently remarked by the former Court of Errors, by the Chancellor and the former Supreme Court, when the Notes of the Revisers, though happily distinguished by great learning and research, were quoted to them, as evidence of the meaning of the Revised Statutes, that they could not receive them as such, for the legislature might have meant one thing and the revisers another; and that the meaning of the statute was to be gathered rather from its language and the plain import of the words used than from any speculation as to the thoughts or intentions of those who proposed it.

It would doubtless tend to relieve our task of interpreting the Code of much of its burden, if we could be at liberty to refer in all instances to the views of the commissioners in reporting it; and though that might involve in all cases, the enquiry whether the part under consideration had been reported by them or interpolated by the legislature, and might sometimes require us to give a construction quite foreign to the plain import of the language used, yet it would materially lessen both the responsibility and the labor, which seem to be accumulating upon us.

But I know of no principle to authorize us to adopt such a course. The maxim, *a verbis legis, non est recedendum*, is as old as the common law itself, and nothing is better settled than the rule that the intention of the lawgiver is to be deduced from a view of the whole and every part of a statute, taken and compared together, and that the true meaning of a statute is properly to be sought from the body of the act itself. The current of authority is in favor of reading statutes according to the natural and most obvious import of the language per BRONSON, J. 20 *Wend.* 561, and where the words are not explicit, the intention of a statute is to be gathered as well from its context, as from the occasion and necessity of the law, from the mischief felt and the

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objects and remedy in view (1 *Kent's Com.* 462). Such I understand to be the sound maxims of interpretation established by the experience and ratified by the approbation of ages, and I have neither the power nor the inclination to wander from them in pursuit of the presumed intention of the propounders of the statute.

Any other rule would substitute the discretion of the judge for the fixed rule of law; would cast every man's rights afloat upon an unexplored sea, and would annihilate that certainty which in law is the mother of repose.

The admission made at the bar, to which I have alluded, and the decision of the Superior Court to which we were referred, both are based upon the idea that the writ of *ne exeat* has merely the office of the *capias ad respondendum* at law, and issues only for the purpose of arresting the defendant.

This is a mistaken view of the office and purposes of the writ. Like the writ of *supplicavit* it is one of the peculiar remedies connected with the exclusive jurisdiction of equity, and it may as well be said that the writ of *supplicavit*, which is in the nature of the process at common law to find sureties of the peace and is resorted to by the wife against her husband, is abolished because both at law and in equity, the wife has another adequate remedy. It is true it is seldom used, but it is equally true that it has not therefore ceased to exist as a provisional remedy (*Codd vs. Codd*, 2 *J. R.* 141; 2 *Story Eq. J.* § 1466).

The writ of *ne exeat*, was originally used for political purposes and was founded on the idea, that because every man was bound to defend the king and his realm the king might, as part of the prerogative of the crown, command any man that he should not go beyond seas or out of the realm (*Fitz Nat. Brev.* 85; 2 *Co. Ins.* 54; *Com. Dig. Chancery*, 4 *B*). In the reign of Elizabeth it was applied to civil purposes in aid of the administration of justice (2 *Story Eq. J.* § 1467). In this country it is used, not so much as a prerogative writ, as a writ of right, and in general will not be granted unless in cases of equitable debts or claims, for the reason that on legal claims there is an

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adequate remedy at law (*Beames Ne Ex.* 30; *Seymour vs. Hazard*, 1 *J. C. R.* 1).

Such is the general rule, to which there are two exceptions; and one of them is the case of alimony decreed to a wife, which will be enforced by this writ, against the husband, if he is about to quit the realm (*Shaftoe vs. Shaftoe*, 7 *Ves.* 71; *Dawson vs. Dawson*, *Id.* 173; 2 *Attk.* 210).

And the question arises whether the writ, in this, one of the excepted cases, is the case of an arrest prohibited by section 178 of the Code, or is one of those provisional remedies which is saved to suitors, from the process of abolition, by sections 244 and 468.

If we look upon the writ merely as a means of enforcing an equitable debt, we may well conclude that it is superseded by the arrest provided for in the Code; but if we look upon it as a prerogative writ to compel a man to remain at home until he has performed his duty to the realm or as a writ in aid of the exclusive jurisdiction of equity, restraining one who designs to avoid the justice and equity of the court by going beyond-seas (*Wyatt's Practical Register*, 289), we may well doubt whether it is or ought to be abolished. And we may well imagine that there were members of the legislature learned enough to know its full scope and office and wise enough to wish to retain it, in cases where its abolition could be of no practicable benefit and its continuance of no possible injury.

The writ has been applied to foreigners temporarily in this state, upon the principle that by going beyond the state they might avoid the jurisdiction of our courts and deprive parties resorting to our courts of their right to a remedy in them (*Woodward vs. Shatzell*, 2 *J. C. R.* 412; *Mitchell vs. Bunch*, 2 *Paige*, 606).

It has been applied to cases where the party has real and personal property out of the state, which our courts can compel him to assign for the benefit of creditors suing here.

To an accountant of the crown about to leave the realm without having rendered his accounts (*Attorney General vs. Mucklow*,

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1 *Price Rep.* 289), and to cases where it clearly appeared that the plaintiff was entitled to a decree for a specific performance (*Bochin vs. Wood, Turn. & Russ.* 332). These, as well as the action of account, are cases in which the writ has other offices than merely the enforcement of the payment of an equitable debt, and they are cases in which the prosecuting party must be often without remedy unless the writ can be resorted to.

A suit for alimony is like to them. In *Denton vs. Denton* (1 *J. C. R.* 364), upon a petition setting forth that the wife had filed her bill for a divorce, that the defendant had abandoned her and treated her with cruelty; that she had no means of support, and that the defendant was a man of large fortune and threatened to leave the United States, and praying for a ne exeat and a writ of supplicavit to restrain the defendant from molesting her retreat, Chancellor Kent said that the allowance of a ne exeat, where the husband threatens to leave the state, is essential to justice and had been granted in like cases, and he allowed the writ.

Is all this done away with by the Code and these salutary offices of this writ abolished by it?

None of these cases are founded upon the narrow idea, so much dwelt upon, that the suit has as its sole office the requiring of equitable bail for equitable debts, but upon the broader principle that it is necessary to the due exercise of this court's peculiar and exclusive jurisdiction and to prevent a failure of justice.

Are we compelled to declare that this principle is blotted out of our system of jurisprudence? Surely not; certainly we can not be required to deny to parties this long accustomed and efficient remedy unless the language of the statute is too plain to be mistaken.

In *Mitchell vs. Bunch*, *supra*, the chancellor said that if the court had jurisdiction of the cause and the defendant intended to leave the state, so that the decree against him would be ineffectual, the complainant had a right to the writ; and if this be true of equitable debts it must be equally true of all the other cases in which the writ could ordinarily issue.

The Code has no where in express terms abolished the writ of

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ne exeat; such abolition is inferrible only from the enactment in section 178, that no person shall be arrested in a civil action except as prescribed in the act, and it becomes important to inquire whether the arrest here spoken of, is one of the same nature and effect with the operation of the writ of ne exeat, so as actually to supersede it, or whether it is not one of those provisional remedies existing at the enactment of the Code not otherwise provided for therein (§244).

One marked difference between an arrest under the Code and a ne exeat is this, that the writ never issued where the person of the defendant could not be touched under the decree either on execution or attachment (*Gleason vs. Bisby*, 1 *Clarke*, 551; *Johnson vs. Glendening*, 5 *Gill & John*, 463). The arrest in an action at law has not now and never has had any such limitation.

Another difference is in the nature of the arrest under the Code. By § 187, the defendant is to give bail that he will at all times render himself amenable to the process of the court during the pendency of the action and to such as may be issued to enforce the judgment therein. Upon a ne exeat the bail is merely that he will not go or attempt to go into parts without the state without leave of the court.

In the one case the sheriff is commanded to arrest the defendant and keep him in custody until discharged by law (*Code*, §185). In the other case he is merely commanded to cause the defendant to come before him and give security not to depart the state.

In one case the surety may discharge themselves by surrendering their principal. In the other they can never be discharged except by order of the court.

Again, it is not necessary, though it is usual, that the ne exeat should be by writ; it may be by order enforced by attachment for contempt. Such is the practice in the English Court of Exchequer, where an order is in the first instance granted that the party within a limited time give security that he will not depart the kingdom, and in default that an attachment issue (*Attorney General vs. Mucklow*, 1 *Price*, 289).

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I see nothing in the Code to prevent such a practice, and in case it should be adopted instead of issuing the writ in the first instance, section 178 would clearly warrant an arrest on the attachment as for a contempt.

In an arrest under the Code the bail can be proceeded against for a default only by action (§ 190), but on a *ne exeat*, in case of a breach of the bond, the court may order the securities to pay the money into court (*Musgrave vs. Medex*, 1 *Mer.* 49).

In all essential particulars then, the *ne exeat* is unlike the arrest provided for in the Code. In its nature and effect, and in the cases to which it is applicable it is unlike, and it seems to me that construing this statute by the old and well established rules of interpretation, it is impossible to say that the *ne exeat* is otherwise provided for in the Code and therefore abolished by it.

The relief sought in this case, of the *ne exeat*, and the *supplicavit*, was only that which the Court of Chancery has long been in the habit of granting as appurtenant to its peculiar and exclusive jurisdiction (2 *Story Eq. J.* § 1464), and was precisely that which was sought for and obtained from Chancellor Kent in *Denton vs. Denton* (1 *J. C. R.* 364), and can not with propriety be denied to suitors when asked for in a proper case.

Having thus arrived at the conclusion that the writ of *ne exeat* is not abolished as a provisional remedy, it only remains for me to inquire whether a proper case was presented to justify its allowance.

It has ever been the practice of the Court of Chancery to deny it, where the applicant for it had otherwise an adequate remedy at law, as for instance in cases of concurrent jurisdiction where the defendant might be arrested in a suit at law, and it will be clearly proper still to adhere to that rule to refuse the writ where otherwise the defendant may be arrested under the Code, and to allow it only in those cases, where without it there may be a failure of justice and suitors be deprived of their legitimate right to resort to our courts for the redress of wrongs and the prevention of injuries.

So too it has not been usual, at least in the English courts, to

grant the writ in suits for alimony until a decree for alimony has passed, and I confess that if it had not been for the case of *Denton vs Denton*, and the action of Chancellor Kent, therein, I should for this reason have hesitated and perhaps altogether have refused the writ, but I did not feel myself at liberty to depart from or disregard a rule laid down by that eminent judge, cited with approbation by Judge Story (2 *Eq. J.* § 1472, n. 1), and acquiesced in and practiced upon in this state for a period of 35 years.

In determining the question whether this is a proper case in which the writ ought to be allowed, we are necessarily confined entirely to the case as stated on the part of the plaintiff, the defendant having with much propriety, confined himself within the limits necessary to raise the question of law involved in his motion.

Viewed in that aspect, this case is like that of *Denton vs. Denton* in every essential particular, save one. In that case the defendant had not only put his wife away from him but had abandoned her without home or support, and denied her all support. In this case the defendant has made ample provision for his wife and caused it to be punctually paid to her. No threat of his to withdraw that support has been set up. No avowal of an intention on his part to discontinue it has been alleged, but all rests on the fears of the plaintiff; on her suspicions that he may do so. That he intends to leave the state is sufficiently avowed because he already asserts that his residence is in another state. But there is no reason given for apprehending that he will not return to it from time to time, and be finally within the jurisdiction of this court when its judgment shall be pronounced, and none for believing that he will attempt to remove his large property beyond the jurisdiction of the court, and there is, as I have said, nothing but the fears of the plaintiff that he may do otherwise.

This is not sufficient to warrant the granting of so high a provisional remedy. Facts must be set out on which the court can repose its belief, and those upon which the plaintiff relies and to

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which she points as the foundation of her belief, are not enough to work in our minds the same belief which obtains in hers.

For this reason, I think the writ of ne exeat was improvidently issued and the order of the special term discharging it ought to be affirmed.

SUPREME COURT.

NORTHROP agt. VAN DUSEN.

So much of a rule entered by *default*, upon motion, as grants costs to abide the event of the suit, will be set aside for irregularity, if no notice of the application for costs is given in the notice of motion.

A notice of motion was served on the plaintiff in this case for a rule or order to change the place of trial from Albany to Montgomery county, "and for such other and further rule or order in the premises as the court may deem proper to grant;" but there was no notice of an intended application for costs of motion.

The defendant took the order for the change of the place of trial on the 27th of August, by default, and for ten dollars costs in favor of the defendant to be recovered by him in case he succeeded in the suit.

This motion was made to vacate so much of the order of August 27th, as awarded costs.

R. H. NORTHROP, *Pl'ff in Person*.

F. FISH, *for Defendant*.

PARKER, Justice.—Crippen vs. Ingersoll (10 *Wend. R.* 603), is decisive on the point that under a general clause in a notice asking for other and further relief, the party can not take costs of motion. The order of 27th August is therefore irregular, and so much of it as provides costs must be set aside.

The order did not give costs absolutely as in the case cited. It only provided what the law would have given without an entry

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in the order under the late practice, and what would have been allowed if asked for in the notice, whether the motion was granted or denied. For these reasons, considering the unsettled state of the practice and that this question is for the first time presented, I think no costs of this motion should be allowed.

5 How. 135—*Contra*, 4 How. 240.

SUPREME COURT.

HARTMAN AND OTHERS agt. SPENCER.

A motion to change the place of trial can not be made *before* the issues in the cause are settled (SELDEN, Justice).

Where a defendant moved to change the place of trial for the reason that a large number of witnesses residing in the proposed county were required to prove a breach of the covenant of quiet possession set up in the answer; but no eviction being averred by the defendant; and it appearing moreover that he never had possession of the premises at all. *Held*, that under such circumstances the covenantor could not be made liable (5 *Hill*, 599). Motion denied.

Seneca Special Term, October 1850. This is a motion on the part of the defendant to change the place of trial of this action from the county of Livingston to the county of Tompkins, on the ground that a great number of witnesses, material and necessary to sustain the defence, reside in Tompkins and the adjoining counties.

It was conceded upon the argument that the pleadings had not terminated, and that issue was not then joined in the cause; and the motion was opposed upon this ground, as well as upon the merits.

SELDEN, Justice.—Whether a motion to change the place of trial can be made before the issues in the cause are settled, is a question of much practical importance, and one upon which the decisions are conflicting.

It has recently received an elaborate examination by Justices WILLARD of the fourth, and SILL of the eighth district, who have come to opposite conclusions: the former having held in the case of *Schenck vs. McKie*, (4 *How. Pr. R.* 246), that the settled

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practice prior to the Code, which required motions to change the venue to be made before issue, was equally applicable to motions under the Code to change the place of trial; and the latter having decided at a general term, with the concurrence of his three associates in the eighth district, that the motion must under the provisions of the Code, be postponed until the issues are joined (*Mixen vs. Kuhn*, 4 *How.* 409).

This last case being the most recent, as well as the only one reported in which the question has been passed upon at a general term, I should for these reasons alone, be disposed to follow it. But the conflicting views entertained upon the question, and the fact that the practice is still unsettled, and differs in different districts, have induced me to look into the subject with some care for the purpose of satisfying my own mind as to its real merits; and while from this examination I am led to concur in the reasoning of Mr. Justice SILL, I also think that another line of argument may be pursued, which will serve to make the accuracy of his conclusion still more clear.

By the common law and the practice of the English courts there were two distinct and separate modes of obtaining a trial in a different county from that in which the venue was first laid. In transitory actions it might be accomplished by changing the venue, on motion, to the county in which a trial was desired; thus incidentally controlling the place of trial through the operation of the rule which required the venue to be issued, to the county where the venue was laid.

This practice was first introduced by the judges as a substitute for that of a traverse of the venue to be tried by a jury, in order to avoid the inconvenience and delay of the latter mode; and applied originally only to actions which were local, or which, although transitory by the common law, had been rendered quasi local by certain old English statutes.

It began, however, at an early day to be used for the purpose of securing a trial in actions purely transitory, in the county where the witnesses principally resided (*Foster vs. Taylor*, 1 *Term R.* 776; *Watt vs. Daniel*, 1 *Bos. & Pul.* 425).

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But in actions which were local the venue, if *laid in the proper county*, could not be changed. If, therefore, in such an action, it became necessary for any reason, as to obtain an impartial trial, that the place of trial should be changed, it was accomplished in a different mode; to wit, by a suggestion upon the record that a fair and impartial trial could not be had in the county where the venue was laid, with a *nient dedire*, as it was called; that is an order *by default* or *nil dicit*, that the venue issue to an adjoining county.

From the form of this entry it is obvious that it was first adopted in cases where it appeared from the record itself, either that justice required the place of trial to be changed, or where all the jurors within the *visue*, were interested, or that the venire must necessarily be awarded to another county, as where the venue was laid in Wales, to which the venire did not run.

But the same form was afterwards used where it was shown by evidence *dehors* the record, that it was necessary to send the case to another county in order to secure an impartial trial. The practice in such case was, on presenting the facts by affidavit to the court to obtain a rule to show cause why the party should not be at liberty to enter the usual suggestion with a *nient dedire*, upon the roll; and if sufficient cause was not shown the rule was made absolute and the suggestion entered (*Rex vs. Harris* 3. *Burr.* 1330).

These two modes of changing the place of trial were entirely distinct from each other. Lord Mansfield, in the case last cited, says:

“No two things can be more difficult than *changing* the venue and continuing it as it was, with such a suggestion upon the roll as is now proposed.”

The latter mode was applicable to actions whether transitory or local; while the former could only be used in those which were transitory; except where in a local action the venue was laid in a wrong county.

Motions to change the venue might always have been made before issue joined: and ultimately this came to be required, for

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the purpose of avoiding delay; but a suggestion upon the roll by which the trial was transferred to a county other than that where the venue was laid, could not be entered until the pleadings were closed.

This suggestion embraced an award of the venire, which could not be made until the cause was in readiness for trial.

With this brief review of the practice of the English courts transplanted into and adopted by our own, we are prepared fully to comprehend the various provisions of the Revised Statutes (2 R. S. 409, §2), on the subject of venues.

The first and second subdivisions of this section simply declare what actions shall be local. The third subdivision, which provides for the trial of transitory actions, in the first place expressly enacts the rule of the common law, requiring causes to be tried in the county where the venue is laid; and then it authorizes the court, when necessary for the convenience of parties or witnesses or for the purposes of a fair and impartial trial, *to order the issues* to be tried in some other county.

This provision, it will be seen, did not contemplate any change of venue; that was to remain as before. It did not confer any new power upon the court; certainly so far as the object of securing a fair and impartial trial was concerned; but it contemplated an application of this mode of changing the place of trial, by direct order instead of incidentally through a change of venue, to cases in which it had not in practice been, at least extensively used; that is, where the object was to promote the convenience of witnesses.

The last clause of the section then gives to the court the power to change the venue in all cases, whether local or transitory for the purpose of securing an impartial trial. Now this clause introduced a substantial change into the law. As we have before seen, if in a local action it became necessary prior to this statute, to change the place of trial for the purposes of impartial justice, it could only be done by an entry upon the record; but this clause puts such actions upon the same footing with those which are transitory.

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The effect of these provisions, taken together was, to break up the distinctions which previously existed, in practice, between transitory and local actions in regard to the *mode* of obtaining a change in the place where they were to be tried.

It is obvious, I think, that the provision for effecting the desired change by direct order, without a change of venue, was in substance a statutory adoption of the English practice before referred to. This order under our statute could not properly be made until the issues were joined, for several reasons:

1. Because the language of the act seems to imply this, "to order such issues to be tried," &c. By referring back to the commencement of the section we see that the words "such issues" mean "issues of fact joined." How can the court order an issue joined, to be tried, until it is actually joined; especially as until the issue is joined, it is impossible to know whether the pleadings will terminate in an issue of fact or of law.

2. As this mode of changing the place of trial is a mere substitute for that, or rather is in substance the same as that of the English courts by suggestion upon the record, with an award of the venire to another county, it would seem that the practice in regard to the latter should regulate the proceeding.

3. The order to change the place of trial must of necessity go into the record; that is, as the practice stood at the time the statute was passed; because otherwise it would have appeared upon the face of the record itself, that the trial was in the wrong county. How then would a record have looked with such an order intermediate the declaration and plea, or the plea and replication? Certainly, to a correct practitioner in the courts of that day, somewhat incongruous.

I think it clear, therefore, that under this provision of the Revised Statutes, or under the practice as it stood prior to that enactment, a direct order to change the place of trial of an issue of fact, could only with propriety be obtained until an issue of fact was joined.

We come, then, to the consideration of the judiciary act of 1847.

Section 48 of this act provides that all issues of fact *pending*

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in the Supreme Court, or any Court of Common Pleas, when the act took effect, should be tried in the county where the venue should be laid; and section 49 authorizes the Supreme Court to order any issue of fact joined in any suit or proceeding, either at law or in equity, whether joined in the Supreme Court or any County Court, or other court, to be tried in any other county.

These two sections taken together, are a little equivocal, because there is nothing to which the words "any other county," in section 49 can refer, except the latter part of section 48.

But it is clear that the provision in section 49 is not limited to the cases provided for in section 48, because it embraces issues in *equity* as well as the new County Courts, which were not within the provisions of section 48.

This section, however, to wit, section 49, produced no change whatever in the law. It gave no new power to the court; nor did it take away any which it previously possessed. Neither section 49 nor any other provision of the judiciary act, effected any change in the power or practice of the court in regard to the change of venue. It was a mere reenactment of so much of the Revised Statutes (2 R. S. 409, § 2), as authorized a direct order changing the place of trial without a change of venue.

The rules in regard to venues, that is, in regard to the influence of the venue upon the place of trial, remained untouched by this act. Even section 46, which was almost immediately repealed, recognized the controlling influence of the venue in this respect.

I deem it clear, therefore, that the practice of regulating the place of trial incidentally through a change of venue, continued in full force under the judiciary act.

No change whatever having been wrought by this act upon the subject we are considering, it follows that an order under section 49 of the act for the trial of an issue of fact in a county other than that where the venue was laid, could only be obtained after issue joined, for the reasons already given; which are just as applicable to a proceeding under this provision, as under that of the Revised Statutes before referred to.

It only remains for us to consider the effect of the enactments of the Code upon this question.

Sections 123, 124 and 125 taken together make all actions local, except where all the parties reside out of the state; and they declare in what counties all actions shall be tried, subject however "to the power of the court to change the place of trial in the cases provided by statute."

Now there is nothing in either of these sections to interfere with the practice of the court in regard to the change of venues. The whole statutory power of the court over the place of trial is expressly reserved; and that power might be exercised for aught which these sections contain, in the same way, and in every way in which it had been before exerted.

But other provisions of the Code by which the venue itself is virtually abolished, have destroyed one means by which the court exercised its control over the place of trial. This power of the court being a mere incident of the relation between the venue and the place of trial, must necessarily fall with that upon which it was based. The whole practice of changing venues is swept away; not a vestige of it remains.

What power of the court then is reserved by the sections of the Code referred to? It can only be that power given or confirmed by the Revised Statutes, and reiterated by section 49 of the judiciary act, to order "issues of fact joined" to be tried in any county for the purposes of convenience or justice; and I have, I think, conclusively shown that that power could only be exercised after the issues were in fact joined.

In addition to and in confirmation of this view of the question, may be urged with great force, the reasons given by Mr. Justice SULL., in *Mixer vs. Kuhn*, showing the strong propriety of requiring the issue to be first joined.

But independently of this preliminary objection, I think the motion must fail upon the merits, inasmuch as a large number of the witnesses sworn to on the part of the defendant, are required to prove a breach of the covenant of quiet possession set up in the answer.

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No eviction is averred by the defendant; and it appears moreover that he never had possession of the premises at all. The case of *St. John vs. Palmer* (5 *Hill*, 599), is conclusive to show that under such circumstances the covenantor can not be made liable.

The motion must be denied; but in consequence of the unsettled state of the practice, no costs are allowed.

SUPREME COURT.

RUSSELL agt. SPEAR and BUTLER.

The plaintiff has no right to amend his complaint, by striking out the name of one or more parties, without leave of the court.

Essex Special Term, July, 1850. This is an action for the recovery of part of lot No. 32, in Legges patent, in the county of Essex. It was originally brought in the names of James Brown, David Russell and Solomon W. Russell. The defendants answered the original complaint, whereupon the plaintiffs, within twenty days thereafter, served an amended complaint, omitting the names of David Russell and James Brown, as plaintiffs. The defendants having omitted to answer the amended complaint, the plaintiff now moves for judgment for want of an answer.

From the affidavits in opposition, it appears that the defendants, on being served with the amended complaint, immediately gave notice that it would be disregarded, as it was between different parties. Both the original and amended complaints were sworn to.

JONATHAN TAKEBELL, for the motion, contended that the plaintiff had a right by the Code (§ 172), to amend within twenty days.

BUTLER and HAVENS insisted that the plaintiff could not amend by striking out parties without leave of the court.

WILLARD, Justice.—The plaintiff in this case is not entitled to judgment, unless he had a right to amend his complaint by striking

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out parties without leave of the court. As no such leave was either asked or given, the amended complaint was a nullity, which the defendants were at liberty to disregard, unless the plaintiff can show some authority for such an amendment as of course. The 172 section of the Code applies only to such amendments as will not create an action between other parties. It is substantially conformable to the former practice. There is no part of the Code which permits a plaintiff to change the parties in the cause without leave of the court (*see* § 122). The former practice did not allow a plaintiff in chancery to dismiss the bill as to a part of the complainants without leave of the court, especially in a bill sworn to, and after answer. Nor could the name of a lessor be struck out, except on motion, under the former practice (10 J. R. 368).

The plaintiff has been irregular and is not entitled to judgment. Indeed, on a proper motion, the amended complaint would perhaps be set aside.

The present motion must be denied with seven dollars costs.

5 How. 143—APPROVED, 5 Abb. 102, 165; 15 How. 48, 51.

SUPREME COURT.

WHITLOCK agt. ROTH.

In an affidavit for the arrest of the defendant, for fraudulently obtaining goods, &c. the facts which may be within the knowledge of the plaintiff, such as the existence of the debt and the manner in which it was contracted, &c. must be stated *positively*. And where any of the facts necessarily rest upon information derived from others, such as the facts of the false representations and fraud on the part of the defendant, they may be so stated; but the sources and nature of the information should be particularly set out, and good reasons given why a positive statement can not be procured. The allegation of "information and belief" merely, in reference to such facts, is not enough.

New York General Term, October 1850. EDMONDS, Pres. J. EDWARDS and MITCHELL, Justices. This was an appeal from an order made at special term discharging the defendant from arrest. The charge was that the defendant had fraudulently contracted the

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debt in question in this, that he had falsely represented himself as a partner in the house of Churchill & Co. of Kalamazoo, Michigan. The allegations of indebtedness and of the representations were positively made in the affidavit on which the order for arrest was made, but there was no allegation of the falsity of the representations except in these words: "this deponent is informed and believes and expects to prove that said Roth was not at the time of contracting for such goods a member of any such firm as M. C. Churchill & Co., or authorized by them to purchase such goods."

The motion to discharge the order of arrest, was made on affidavits on the part of the defendant in which, among other things, he swore positively that he was a member of that firm, and it was opposed by affidavits on the part of the plaintiff, setting forth that he had sued Churchill & Co. in Michigan, in which suit Churchill put in a sworn plea, of which as plaintiff was "informed and believed" a copy was annexed, and in which Churchill makes oath that "he was never a partner with or of said Roth."

In the special term, the order of arrest was discharged on the ground that the falsity of the representations was stated on information and belief.

G. BOWMAN and C. O'CONOR, *for Plaintiff.*

——— TRACY, *for Defendant.*

By the Court, EDMONDS, *Pres. J.*—It would not do to lay it down as a general rule that an order of arrest could never be granted on information and belief, or without a positive averment of facts, by persons conversant of them. That would be to forbid an arrest in a large class of cases, where it would be manifestly proper; such, for instance, as those where a purchaser from the country makes representations in the city, the truth or falsity of which can be ascertained only in the country, in the vicinity of the purchaser's residence. Such a rule in that case, especially where this contract of sale is rescinded because of fraudulent representations, would require for a provisional remedy as much evidence as would be necessary for a final recovery.

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But, on the other hand, those considerations, would not justify the ordering an arrest upon the general allegation contained in this case that the plaintiff has been informed and believes that the representation was false. The nature and quality, and perhaps the sources of the information obtained must be set forth, so that the court may be able to ascertain whether the party is right in entertaining the belief to which he deposes. By the Code, the officer applied to for the order to arrest must determine upon the propriety of granting it. There must be something for his mind to act upon. He must entertain a belief that the charge made is true. Such an affidavit as that used in this case would answer none of these requisites, but would substitute the belief of the party for that of the judge.

If in this case, the plaintiff had stated that he had made inquiries in Michigan and had there been informed by Churchill and others, who would be likely to know, that there was no such firm as Churchill & Co., or that defendant had never been a member of it; or if he had stated that he had ascertained, stating the source of his information, that Churchill had made oath in court there, that there was no such firm, there would have been something for the judge's mind to act upon; some means for that officer's determining whether the plaintiff was right in believing the representation false; there would have been some means afforded the defendant of testing the accuracy of the plaintiff's affidavit; some mode provided of ensuring accuracy by the fear of a conviction for perjury. But upon this affidavit there is not only nothing for the judge's mind to act upon and ascertain whether the plaintiff's belief was well founded, but no means for the defendant's proving the incorrectness of the affidavit, however false it might be, and no mode of punishing such falsehood. To allow such a practice would be in fact, substituting the opinion of the party for that of the judge and removing all control and supervision by the judges, which the law has provided over the power of arresting defendants.

So far as the facts may be within the knowledge of the plaintiff, such as the existence of the debt and the manner in which it

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was contracted, they must be stated positively; but so far as they necessarily rest on information derived from others, they may be so stated, when the sources and nature of the information are particularly set out and good reason is given, why a positive statement of them can not be procured.

The original affidavit therefore on which the order of arrest was obtained in this case, was defective and did not warrant the defendant's arrest. The other affidavits used on this motion do not supply the defect. The only material additional allegation contained in them is in reference to Churchill's affidavit in the courts of Michigan. That affidavit is not so verified that it can be referred to as such on this motion, and it is presented simply as a paper which the plaintiff is informed and believes is a copy of one filed in Michigan. There is no statement of the sources of that information, no means of the defendant's ascertaining whether such information had actually been received by the plaintiff nor for the court's determining whether he was right in believing it. It is, in fact, liable to the same objection that exists against the original affidavit, and both are defective inasmuch as they substitute the belief of the party for that of the judge.

The order of the special term must be affirmed with costs.

SUPREME COURT.

BROWN, RUSSELL and RUSSELL, agt. SPEAR and BUTLER.

Where an answer merely denies the facts set up in the complaint, and contains no statement of new matter, constituting a defence, the plaintiff is not bound to reply thereto.

The defendant can not in such case move for judgment for want of a reply; but his remedy is to notice the cause for trial.

Essex Special Term, July 1850. This is a motion made by the defendants for judgment against the plaintiffs, upon the defendants' answer, for want of a reply.

The action was brought under the Code to recover a lot of

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land in Legges patent and was commenced in February 1849. On the 26th May 1849, the answer was served. The plaintiffs have never replied to the answer. On the contrary they amended their complaint by striking out the names of David Russell and James Brown. (See opinion in Russell agt. Spear and Butler, *ante* page 142).

The defendants insist that they are entitled to judgment for want of a reply.

—— BUTLER, *for the Motion.*

J. TARBELL, *Contra.*

WILLARD, Justice.—By section 154 of the Code, it is provided that if the answer contain a statement of new matter, constituting a defence, and the plaintiff fails to reply or demur thereto, within the time prescribed by law, the defendant may move, on a notice of not less than ten days, for such judgment as he is entitled to upon such statement, and if the case require it, a writ of inquiry of damages may be issued. All the papers needed for such motion are the summons, complaint and answer and the notice of motion. The motion clearly relates only to a case, where the answer relies on new matter, which constitutes a defence. That is not this case. The defendants interposed an answer denying the whole case of the plaintiffs. In short, the answer amounted only to the old general issue. The additional matter stated, constitutes no defence, and required no reply. It may all be true, and the defendants be mere squatters.

The defendants have mistaken their remedy; they should have noticed the cause for trial.

The motion must be denied with seven dollars costs.

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The defendants have mistaken their remedy; they should have noticed the cause for trial.

The motion must be denied with seven dollars costs.

Van Nests and others agt. Conover.

SUPREME COURT.

VAN NESTE AND OTHERS agt. CONOVER.

In an action for the recovery of the possession of personal property, the defendant is liable to be arrested if the property has been removed, concealed or disposed of so that it can not be found by the sheriff, and it is not necessary, in order to justify such arrest, to show that such removal, &c. has been done feloniously fraudulently or in bad faith. It is enough simply to show that it has been removed, &c. beyond the power of the sheriff to take it (*Code*, §179).

In such case it would seem to be useless for the judge who orders the arrest, to specify the amount in which the defendant is to be held to bail, for by sections 187 and 211 of the Code, he can be discharged from arrest only on giving bail in double the value of the property as fixed by the plaintiff, and that not for the defendant's appearance in the action merely, but for the return of the property which may for any cause be awarded against him, and in such case the bail can not surrender their principal.

Where a quantity of corn was sold on agreement that it should be paid for by the vendee on delivery; and it took several days to deliver it into the vessel designated; and upon the delivery of the whole a bill was presented and payment demanded, which was put off from time to time until the vessel had sailed. In a suit for the recovery of the possession of the corn, *held*, that the title did not pass to the vendee absolutely on the delivery.

New York General Term, May 1850, before EDMONDS, Pres. J. EDWARDS and MITCHELL, Justices. The defendant was a dealer in produce in the city of New York and applied to certain produce brokers to purchase a quantity of corn for shipment abroad. They refused to sell to him except for cash, and it was finally agreed to sell him three boat loads for cash, payable on delivery. The corn was delivered directly from canal boats on board of a ship bound for London and was three days in delivery. When the last was delivered a bill was rendered and the next day, the payment of the price was called for. Payment was delayed on one pretence or another, until the ship left the port on her foreign voyage. In the mean time the defendant continued his business as usual and made large payments in the course of it; but shortly after the sailing of the ship, he failed. The brokers acting for the plaintiffs, as owners of the corn, demanded the corn from the master of the ship and from the defendant, and not being able to

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obtain a return of it, this suit was commenced for the recovery of the possession of it. The sheriff made return to the process, that he had personally served the summons, but was unable to return the corn to the plaintiffs because it had been removed and disposed of, so it could not be taken and returned by him; whereupon the plaintiffs obtained an order for the arrest of the defendant and he was arrested accordingly. The defendant being unable to give the bail required by the statute, applied by motion to the special term to be discharged from the arrest. The motion was denied and an appeal taken to the general term.

S. JONES, *for Defendant*, claimed the defendant's discharge on two grounds: 1. That the corn did not belong to the plaintiffs, but the title had absolutely passed to the defendant by the delivery; and, 2. That in order to justify an arrest it must appear that the property had been removed out of the bailiwick of the sheriff fraudulently, or at least with an intention to place it beyond his reach.

W. C. NOYES, *Contra*.

(There were three suits involving the same question.)

By the Court, EDMONDS, *Pres. J.*—In these cases there was a sale of corn for cash, payable on delivery. Several days were employed in the delivery and with the last parcel was delivered to the defendant a bill of the purchase and on the next morning a demand was made of the price.

Under these circumstances there can be no pretence for saying that the sale was absolute and unconditional, and that the delivery transferred the property to the defendant leaving to the plaintiffs only their remedy for the price. The agreement was very precise, that the corn was to be paid for on delivery, and unless so paid for was not to become the property of the defendant. There is nothing to show that this condition was waived. A bill of the goods was presented with the last parcel and payment required without delay, and we can not say that the plaintiffs intended to part with the ownership of their property and to rely only on the defendant's promise to pay. It is manifest that they did not in-

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tend to change the ownership until payment was made and that intention was fully carried out by their acts.

The ownership of the property continued in the plaintiffs and they had a right to attempt to recover its possession, as they did in this action. In such case the Code provides that in case they can not recover it, that is, where the property or any part thereof has been concealed, removed or disposed of, so that it can not be found or taken by the sheriff, the defendant may be arrested. The sheriff has made his return to that effect, and it is a conceded fact in the case that the property has been sent abroad so that the sheriff can not deliver it to the plaintiffs. All this is plain enough and presents a case quite distinctly within at least the letter of the statute. But the statute contains an enactment on this subject, so severe in its operations, so unlike all cases of arrest, except for crimes of the deepest dye; so contrary to the whole course of legislation for more than thirty years on the subject of imprisonment for debt, that a doubt has arisen whether it could be possible that the legislature could have intended what their language plainly imports, and whether the court ought not in fact to interpolate the words "fraudulently or feloniously" in the statute to make it consistent with the most palpable requirements of justice.

We confess that if we were passing as legislators on the third paragraph of section 179 of the Code, we should pause a good while before giving our consent to the enactment without the insertion of some words requiring fraud, felony or bad faith to be at least charged, and we are inclined to believe that if the legislature had duly considered the effect of what they were enacting, they would have evinced a like commendable condition of hesitancy. They have, however, passed a law and however we may regret the severity of its character, or however plainly we may perceive that it may become a monstrous engine of oppression, it is our province merely to construe it according to its plain import and to enforce it agreeable to its manifest tenor. To the legislature alone belongs the task of correcting the unjust operation of a plain enactment. and judicial legislation, like that

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which is now invoked at our hands, must always be mischievous, for the simple reason, if for none other, that the judiciary are not clothed with the power of making all the enactments necessary to enable a statute to operate wisely and well.

In this case the harsh operation of the statute consists in its unusual requirements of bail from the defendant in the action, not for his appearance merely, as in other cases, but for the delivery of the property to the plaintiff, if delivery be adjudged, "and for the payment to him of such sum as may for any cause be recovered against him;" and in the provision that the bail can not in this as in other cases of arrest surrender their principal (*Code*, §§ 179, 187, 188, 211). With this additional feature, that while in other cases of arrest, some supervision over the conduct of the plaintiff in an action is provided, in requiring him first to submit his case to a judge and obtain his sanction to the arrest and the amount in which the defendant is to be held to bail; in this action, the judge has no control over the amount, but it must be in double that value of the property which the plaintiff pleases to put upon it.

It is not difficult to see how cruelly under such a statute, a plaintiff, with the merest pretence of a claim, or even without any may oppress and harass his victim; and how difficult it will be for the court, in the face of its unequivocal language to afford any protection. But this does not give us the power to alter the law as it is written.

The enactment under consideration is very plain. "The defendant may be arrested as hereinafter prescribed in the following cases": among others "in an action to recover possession of personal property unjustly detained, where the property or any part thereof has been concealed, removed or disposed of so that it can not be found or taken by the sheriff" (*Code*, § 179). There is not a word here about a fraudulent, felonious, or *mala fide* concealment, removal or disposal of the property. It would seem to be enough that there was such concealment &c., even if in the utmost good faith. The omission of fraud in this paragraph is evidently not accidental, for it is carefully used in the preceding

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and subsequent paragraphs of that section and as carefully omitted here. Thus, when one is to be arrested for misapplying property as a public officer, it must be shown to have been fraudulently misapplied, and so when to be arrested for a debt it must have been fraudulently contracted or the debtor's property removed with intent to defraud.

We are not forgetful of an inconsistency to which our attention was called on the argument, namely, that the same statute which requires from a defendant security for double the amount of the claim against him, in cases where the property is beyond the sheriff's power to redeliver, though in perfect good faith requires from a public officer who has fraudulently misapplied public property, or from one who has fraudulently contracted a debt or fraudulently removed his property, merely, security for his appearance, thus inflicting upon misfortune, a greater punishment than upon positive fraud or official misconduct.

But this, while it may excite our surprise at such an unhappy system of legislation so variant from its uniform course for many years, does not in any respect increase our authority to remedy the evil or tend to warrant us in assuming the power of altering the plain language of a statute.

Nor have we overlooked the analogy drawn from the office of the *capias* in *withernam*, for which this enactment is intended as a substitute. That writ was used where the property sought on the plaint in *replevin* was *eloigned* and commanded the sheriff to take and deliver to the plaintiff other property of the defendant's equal in value, and it issued on the mere return of the sheriff of *elongata* to the plaint. The form of the return was "before the coming of this writ to me, the beasts in this writ specified were *eloigned* to places to me unknown by the within named, &c., so that I could by no means make *replevin* of said beasts as within commanded." The *capias* in *withernam* signifies a reciprocal distress in lieu of the first which is *eloigned*, so that it is distress against distress, one being taken to answer the other by way of reprisal. Goods were said to be *eloigned* when they were so disposed of that the sheriff could not get at them to

Niver and another agt. Rossman.

make replevin, and it was no matter whether the goods were thus placed beyond the sheriff's reach designedly to prevent his executing the process in replevin or in entire good faith, in the honest belief that the eloignor had the right to do so. In either event, the *capias in withernam* issued. It was in no respect founded upon the inquiry whether the distress had been taken away, with an intention to evade a replevin, but upon the mere return that it was taken away so that the sheriff could not make replevin.

So now, the Code provides that if the property has been concealed, removed or disposed of—not with a fraudulent or felonious intent—not with a design to evade a replevin, but “so that it can not be found or taken by the sheriff,” the remedy of arrest may be resorted to. The only difference seems to be in the remedy, namely, an arrest, instead of reciprocal distress, the foundation being intended to be the same in both cases, viz: that the property is so that the sheriff can not make replevin.

We can, therefore, see no reason for requiring from a plaintiff in such an action any thing more, in order to justify an arrest, than the fact which is established in this case, that the property in dispute was removed so that it could not be found or taken by the sheriff and though we may regret the harsh consequences which may follow from the other provisions of the statute, we have no alternative but to affirm the order of the special term, but it must be without costs.

5 How. 153—NOT CONSIDERED IN, 6 How. 11, 12.

SUPREME COURT.

NIVER AND ANOTHER agt. ROSSMAN.

A per centage or extra allowance should be allowed in all *referred causes*; because they are all *litigated* trials. The application should be made in the county where the judgment is rendered, unless some special reason exists for applying elsewhere.

Dutchess Special Term, Nov. 1850. The venue in this cause was laid in Columbia county, and the cause referred by consent

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and tried before a referee, who reported \$500 due to the plaintiffs.

WM. ENO, *for Plaintiffs.*

HOGEBROOM & COLLIER, *for Defendant.*

BARCULO, Justice.—I think the defendant's counsel is mistaken in supposing that the allowance of per centage is not applicable to cases tried before referees. There is certainly nothing in the Code which excepts them. The section applies, in terms, to all "difficult or extraordinary cases." In the case of Dyckman vs. McDonald, *ante page 121*, I have just held that all *litigated* cases are "difficult" in some degree within the meaning of the section. If this be correct, then all referred cases are proper subjects for some additional allowance, for all such cases are *litigated* and cause the party to incur *extra expense*, which is the true ground for the *extra allowance*.

But it is contended that Rule 86 requires the application to be made to the court before which the trial is had, and that as this cause was not tried before any court no application can be made. The answer to this argument is that the *statute* gives the right and the *rule* can not take it away. Moreover the rule does not exclude referred cases by its terms; for it allows the application to be made to the court before which the "judgment is rendered." The rule, therefore, would be literally complied with by applying to the court before which the judgment is, or is to be, rendered. However, I do not suppose this to have been the real object of the rule. I presume the latter clause had reference mainly to the second subdivision of section 308, providing an allowance in numerous cases where no trial is had, but only a judgment rendered.

I think, however, that the terms of the rule as well as the convenience of the parties require the application to be made where the judgment is rendered unless some special reason for applying elsewhere exists. No such reason appearing in this case, I must deny this motion without prejudice to an application to be made in Columbia county, and without costs.

Tracy and others agt. Humphrey.

SUPREME COURT.

TRACY AND OTHERS agt. HUMPHREY.

Where a complaint contains allegations claiming separate and distinct bills or accounts and an aggregate amount as a balance due upon all; and the answer denies one bill, only, and the balance claimed, specifically in the language of the complaint. The plaintiff may have judgment (*under* § 246) for the amount of the accounts not denied by the answer. But the answer can not be stricken out on affidavits tending to show its falsity, where it is verified according to the Code (*Mier agt. Ferguson*, 4 *How. Pr. R.* 115).

New York Special Term, July, 1850. The action was for goods sold and delivered. The complaint was for three separate bills of goods sold at different times. The answer, duly verified, made a specific denial as to one of the bills in the words of the complaint, but was silent as to the other two bills.

E. SANDFORD, moved to strike out the answer as false on affidavits and letters of the defendant, showing repeated acknowledgments of the debt and repeated promises to pay it, and for judgment for such portions of the claim as were untouched by the answer.

EDMONDS, Justice.—In this case the plaintiffs declare for three separate bills of goods sold at different times and claim a balance due of less than the aggregate amount. The defendant answers, denying the purchase of one of the bills and denying that he is indebted in the balance claimed to be due.

A motion is made to strike out the answer as false on affidavits which go very far to show that it can not be true. But the answer is verified and according to our ruling in *Mier agt. Ferguson* (4 *How. Pr. R.* 115), at general term, an answer can not be stricken out as false, when verified according to the Code. The Code has given a defendant the privilege of pleading just as he has pleaded in this case, and though he may owe all the debt demanded of him but one cent, that one cent will, under such a mode of pleading, render his verification of his answer, a sufficient objection to striking it out; and for this reason, that he has availed himself

Tracy and others agt. Humphrey.

of the privilege which the Code has given him, of "denying specifically" one of the averments of the complaint. To avoid such a difficulty, some care must be taken in framing the complaint, and in this case the plaintiffs' difficulty has arisen from the form of their complaint. It is a printed form, I observe, and so imperfectly drawn as to leave open for escape the very opportunity of which the defendant has availed himself.

But the motion is not confined to striking out the answer; it is also for judgment and for other relief, and under that I may afford the plaintiffs some relief.

Two of the averments in the complaint, setting forth the sale of two bills of goods, one for \$10 and one for \$136.31, are not answered at all, and under the Code are to be taken as true. Now in regard to those two sums there is this difficulty in the case; how is judgment to be finally rendered for them? The damages in respect to them can not be, as formerly assessed by the jury on the trial of issues in the cause, because the Code confines the action of the jury to the issues joined, and in respect to those sums, there is no issue and there can be no trial either before a court or jury, because a trial is defined to be the judicial examination of the issues between the parties (*Code*, § 252). I can perceive only one mode of obtaining a judgment for those sums and that is under section 246, for the defendant failing to answer the complaint.

He has failed to answer the complaint in respect to those sums and I do not see why the plaintiffs are not entitled at once to enter judgment for them. It must be so, or else a defendant who answers as to one cent only of a demand for \$10,000 may work out for the plaintiff the delay and expense of a litigation when all of such large sum may be conceded to be due except that one cent. This course may involve the necessity of two judgments on the record in analogy to the old practice where there was a demurrer to part and an issue to part, and the issue be tried before the demurrer is argued, or when in *assumpsit*, there is a demurrer to evidence and the jury discharged without assessing damages; whereupon judgment being finally given for the plain-

Nones agt. The Hope Mutual Life Insurance Company.

tiff a writ of inquiry is awarded, or where in general the jury on the trial of an issue have omitted to assess the damages, the omission may be supplied by a writ of inquiry.

Some such practice must be adopted or I do not see how a plaintiff in case the defendant admits part and denies part of the claim against him can ever get judgment for the admitted part. The plaintiffs may therefore have judgment for the \$10 and the \$136.31, with interest as claimed in the complaint with \$10 costs of motion and costs of suit thus far.

SUPREME COURT.

NONES agt. THE HOPE MUTUAL LIFE INSURANCE COMPANY.

It is a matter almost of course, on motion (under Rule 24), to allow a case to be incorporated into the judgment record entered upon a report of referees upon the whole issue, for the purpose of review by appeal at the general term, where questions of law are involved. A rehearing may be granted on such a motion.

If questions of fact alone are involved a motion for the rehearing should be made at the special term.

Upon an issue joined the whole matter was by consent referred, and upon the coming in of the referee's report on the whole issue, judgment was entered for the plaintiff. In the mean time the defendant made a case which it now asks to have incorporated in the judgment record in order that it may have the decision of the referee reviewed.

A. H. DANA, *for Defendant.*

C. N. POTTER, *Contra.*

EDMONDS, Justice.—By section 272 of the Code, the report of a referee upon the whole issue shall stand as the decision of the court, and judgment, be entered thereon in the same manner as if the action had been tried by the court. By our 24th rule, on filing a report of a referee upon the whole issue, judgment may be entered as a matter of course.

LaWall agt. Grigg.

Thereupon the same rule prescribes the manner in which such a report may be reviewed, that is by making a case in the manner prescribed in the 15th rule, which case can be heard only on appeal at a general term. It must be a matter almost of course, under this rule, to allow the case to be incorporated into the judgment record so that it can be carried up for review.

There is, however, another mode of reviewing the decision of a referee when on the whole matter in issue, and that is by a rehearing by the court in which the judgment is entered (*Code*, § 272).

The defendant, may, therefore, have the benefit of his motion to have the case incorporated into the record, or he may have a rehearing. A special motion at special term is, under the 30th rule, the proper mode of obtaining a rehearing, though the rehearing, if granted on a question of law, ought to be at a general term.

In this case, I do not grant the rehearing, because I see no good reason why the defendant should not be put to its appeal and to giving security thereon as required by the Code, but I grant the motion to incorporate the case into the record.

SUPREME COURT.

LaWALL agt. GRIGG.

The mode of reviewing reports of referees upon the whole issues, in causes referred before the Code (the report made afterwards), is by motion, at special term, to set aside the report agreeable to the requirements of the 44th Rule of 1847, and the former practice.

New York General Term, October 1850. EDMONDS, Pres. J. EDWARDS and MITCHELL, Justices. This suit was pending when the Code was enacted and was referred agreeable to the former practice. In May 1850, the referees reported in favor of the defendant and judgment was perfected thereon on the 21st of May. On the 5th of June, and within the thirty days provided

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by the Code, the plaintiff gave notice of an appeal to the general term and filed an undertaking. The papers did not disclose whether the appeal was on questions of law or of fact, though on the argument, it was averred that the latter were involved.

—— TREADWELL, *for Defendant*, moves to set aside the appeal.

—— PINCKNEY, *Contra*.

By the Court, EDMONDS, *Pres. J.*—The mode of reviewing the report of referees in a suit at law pending when the Code of Practice went into effect is in conformity with the former practice, namely by a motion to set aside the report, conducted agreeably to the rules adopted by the court in July 1847. Section 272 of the Code, which provides for an appeal or rehearing, is not made applicable to old suits; and section 6 of the act supplementary to the Code, which also gives an appeal, is applicable only to suits in equity pending when that act took effect. The present 24th rule of court is not applicable to such a case, but the 92d rule is, and that declares that all actions pending on the 12th of April, 1848, may be conducted according to the rules adopted in July 1847.

Even section 278 of the Code, which requires the judgment to be entered in the first instance on the decision of a single judge, is not made applicable to such a case as this; but our 30th rule, defining what are enumerated or non enumerated motions, classes this motion among the latter and ordains that it be heard at a special term.

The practice adopted in this case then is wrong. An appeal does not lie, but the mode of review, it being a suit pending when the Code took effect, is by a motion to set aside the report of the referees agreeable to the requirements of the 44th Law Rule of 1847, which motion must be heard in the first instance at a special term, under the 30th rule.

The counsel have doubtless been misled by the general nature of the language used in the present 24th rule, and he has misapprehended the purport of it.

It is so general in its terms as to convey the idea that in all cases where the whole issues have been referred the case must be

Miller and others agt. Mather and others.

brought on to a hearing at a general term. But it is to be taken in subordination to the enactments of the statute, and section 348 of the Code allows only questions of law to be taken before the general term for review, so that the language of the 24th rule which directs that the case shall be reheard only on appeal at a general term is necessarily confined to cases which raise questions of law. Where a review is sought upon questions of fact, that part of the rule is not applicable.

I repeat, however, that that rule has nothing to do with this case. The new mode of reviewing reports of referees by appeal or rehearing, not having been made applicable to prior existing suits, the appeal in this case was wrong and it must be dismissed, but without costs and without prejudice to a motion to set the report aside.

5 How. 160—See 2 Sandf. 697.

SUPREME COURT.

MILLER AND OTHERS agt. MATHER AND OTHERS.

An order for discovery may be enforced before issues joined in the cause

New York Special Term, July 1850.

EDMONDS; Justice.—The objection to the discovery sought in this case is that an issue is not joined. I can discover nothing in the Code which confines the discovery within the limits claimed.

On the other hand, the discovery here sought is a substitute for the former bill of discovery in equity in aid of an action at law and such bill might be filed at any time after the action at law was commenced, and indeed in certain cases, namely, where the discovery sought was in reference to whom ought to be parties, even before suit brought.

It would be clearly improper to limit the discovery under the present beyond what it was under the old law, unless the statute plainly required it.

The order for a discovery must therefore be enforced.

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SUPREME COURT.

VAN NAMEE AND OTHERS, agt. THE PRESIDENT, &c. OF THE BANK OF TROY.

A negotiable promissory note endorsed by the payee (as owner) and by him deposited in a bank for collection; and by that bank transferred in the usual course of exchange to another bank for the same purpose; does not create by lien or otherwise, any title in the latter bank to the note or the avails as against the payee, though the former bank fails before the maturity of the note, owing the latter a large balance.

Albany Circuit, HAND, Justice. This was an action to recover the value of a note of which the following is a copy:

"\$116-64-100.

NEW YORK, May 26th, 1848.

"Six months after date I promise to pay to the order of James Van Namee & Co., one hundred and sixteen 64-100 dollars at the Troy City Bank, value received. (Signed) B. F. McNitt.

(Endorsed) "James Van Namee & Co. Pay John Paine, Esq cashier or order. T. Olcott, cash."

Paine was cashier of defendants.

The complaint averred that it was endorsed by the plaintiffs on the 16th of June 1848, for the sole purpose of constituting an agency for the collection and receipt of the money thereupon for their use, and delivered to and accepted by the Canal Bank for that purpose, and delivered to the defendants by the Canal Bank for the same purpose. That the Canal Bank failed on the 11th day of July 1848, and had no power to transfer any interest in the note to the defendants. That a receiver of the Canal Bank had been appointed, and the plaintiffs had themselves, and also through the receiver, demanded the note.

The defendants set up an agreement and practice between the Canal Bank and them by which they mutually remitted notes, &c. payable at their respective banks or in the vicinity, which when paid were credited to the party who sent them, in an account kept by both banks, and that a balance was struck and that balance transmitted to the creditor bank on Monday of each week. That such notes were always regarded by the party receiving them as the property of the bank transmitting them, and this

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note was so received and considered. That on the 11th day of July the Canal Bank was indebted in the sum of \$10,000, to defendants after crediting this note to the Canal Bank. That the defendants were accustomed to transmit to the Canal Bank large sums of uncurrent money issued by other banks, and for these sums the Canal Bank then owed the defendants \$3,100. That the defendants knew nothing of the plaintiffs' claim until the demand of this note after the Canal Bank had failed. On the contrary, upon the faith of this and other demands of a similar kind, the defendants sent to the Canal Bank, notes, &c. to a large amount to collect, and suffered large balances in defendants' favor to accrue and remain in said Canal Bank. And they denied this note was placed in the Canal Bank for collection, or that it was ever the property of the plaintiffs to defendants' knowledge; that the plaintiffs had transferred all their interest to the Canal Bank and the Canal Bank to the defendants.

The plaintiffs took issue upon the material parts of the defendants answer.

It appeared the defendants received the note in question from the cashier of the Canal Bank enclosed in a letter of which the following is a copy:

"Canal Bank, Albany, June 16th, 1848. John Paine, Esq. Cash. Dear Sir: I enclose for account Ward & Co. on Ide, Coit & Co., 187
do. do. 243
B. F. McNitt, "

Very truly, yrs.

T. OLCOTT, Cashier."

It was proved that the note was left by the plaintiffs at the Canal Bank on the 16th of June 1848, for collection, and entered on a book kept for that purpose and not on the deposit book. There was, however, no mark upon the note to that effect. That the defendants were the agents of the Canal Bank for the purpose of collecting notes payable in the city of Troy.

The accounts were settled on Monday of each week and each then drew for what the other had collected, and the difference

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was paid by a check upon some bank in New York. When the Canal Bank suspended on the 11th of July 1848, it had an amount of notes not then matured, which had been sent there for collection by the defendants, and which the defendants drew out in a day or two after the failure. The practice was when a note was collected to credit the amount to the other bank, and if not collected to return it and charge postage and protest. It was also testified, that it was the practice when occasion required to withdraw such notes, by a request to that effect, after they had been sent to the other bank for collection. The defendants ceased to send paper to the Canal Bank for collection some time before its failure, but how long the witness could not remember, but he thought ten days or two weeks. That between that time and the failure of the bank, paper to the amount of \$6000 or 7000, which had been sent by the defendants to the Canal Bank for collection fell due and was not withdrawn. The teller of the defendants testified that the reason this paper was not withdrawn was because the defendants had notes sent by the Canal Bank to the defendants for collection, this note among them. That he asked the cashier of the defendants whether they should withdraw the paper they had sent to the Canal Bank, who answered that they would let it mature in the latter bank and did so. This testimony was offered and given to show that the defendants relied upon the paper in their hands to indemnify them against any loss that might happen. It was objected to, and the court held that the defendants might show their acts, though not mere conversation between the officers of the bank. The cause was tried by the court.

N. HILL, Jr. and A. K. HADLEY, *for Defendants.*

M. T. REYNOLDS and H. C. VAN VORST, *for Plaintiffs.*

HAND, Justice.—There is no evidence of any express agreement that the Bank of Troy should have a lien upon the notes sent to it for collection by the Canal Bank. The defence then must be sustained, if at all, it seems on the ground of their lien as bankers. As a general rule, a banker has a general lien on all securities in his hands belonging to a customer for the general balance due from the latter (2 *Kent*, 641; 2 *Sel. N. P.*, 539;

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Davis vs. Bowsher, 5 T. R. 488). But on the other hand, if the securities do not belong to the debtor but to a third person, *prima facie* the real owner may claim them unless divested of that right by his own act or assent (Saltus vs. Everett, 20 Wend. 267; Hoffman vs. Carow, 22 Wend. 318). The note in controversy in this case undoubtedly belonged to the plaintiffs, and was endorsed by them and placed in the Canal Bank for the purposes of collection merely; and they should have the avails unless the defendants are authorized to treat it as their own or the property of the Canal Bank, or can insist upon a lien as against that bank. As the plaintiffs treated it as negotiable, and gave possession of it to the Canal Bank, and the Canal Bank made an endorsement payable to the defendants, the instrument carries upon it evidence of the legal title's being in the defendants. This, however, will not avail them if they are not in a situation to be considered *bona fide* holders. If they had notice that the note did not belong to the Canal Bank, or if the circumstances known to them were such as to put them upon inquiry; in short, if they have not the right of possession of a *bona fide* holder, they can not hold it as against the owner.

Notwithstanding the general rule above laid down in regard to a banker's lien; there is another rule equally as well settled, that this lien may be controlled by and dependent upon circumstances. Almost every opinion establishing the right affirms the qualification. In Davis vs. Bowsher (*supra*), Lord Kenyon recognized the lien upon the securities in the banker's hands for a general balance, "unless there be evidence to show that he received any particular security under special circumstances which would take it out of the common rule" (5 T. R. 491). And the late Chancellor Kent says it is "subject equally to be controlled by special circumstances (2 Kent, 641). The recent case in the Court of Appeals (1849), of Clark vs. The Merchants' Bank (2 Comst. 380), to which my attention has been called, was not one of lien. Clark & Co., the plaintiffs, were brokers in Philadelphia, and Smith & Co. were brokers in New York; and they were collecting agents for each other, and business correspond-

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ents, and had been for years; and usually, though not always, drew against paper sent for collection. Each kept two accounts, one (No. 1,) contained the remittance of plaintiffs to Smith & Co. and the other (No. 2,) the funds of Smith & Co. transmitted to plaintiffs. The plaintiffs on the 15th of the month sent a sight draft by a house in Richmond on a house in New York for \$7000, endorsed to the plaintiffs and by them to Smith & Co., with other paper, a list of which was headed "For account No. 1." in all amounting to over \$17,000, beside other paper amounting to between \$2000 and \$3000, for collection; and the plaintiffs sent in the same communication their drafts on Smith & Co. amounting to over \$20,000, all of which was received by Smith & Co. on the 16th, who presented the draft for \$7000 to the drawee on that day and received a check on the Phenix Bank, New York, which, on the same day, Smith & Co. endorsed and deposited with defendants, who received the money in the usual course of business on the 17th. Smith & Co. failed on the 16th and did not pay the drafts of plaintiffs upon them, and on the 18th the plaintiffs claimed the proceeds of the check of the drawees and afterwards sued the defendants. The Court of Appeals held that it was sent to be placed to the credit of plaintiffs to be drawn against in the usual course of business, and that plaintiffs could not recover; and reversed the judgment of the Superior Court of New York in their favor. GARDINER, J., in delivering the opinion of the court, put it upon the ground that the check was transmitted to be credited to the plaintiffs, and not for collection. *Brandão vs. Barnett* is reported three times. It was first decided in the Common Pleas in 1840 (1 M. & G., 908), next in the Court of Exchequer Chamber in 1843 (6 *id.* 630), and lastly in the House of Lords in 1846 (3 M. G. & S. 519). Burn was the agent for many years of Brandão, who at first resided at Rio de Janeiro and after in Portugal. Burn bought on account of the plaintiff and with plaintiff's money, certain exchequer bills and deposited them in a tin box which he kept at his bankers, the defendants, he retaining the key of the box. Whenever it became necessary to receive the interest on the exchequer bills, and

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to exchange them for new ones, Burn was in the habit of taking them out of the box and giving them to the defendants for that purpose, such being the usual course of business, after which new exchequer bills were handed over to be locked up by Burn in the box; the amount of interest received by defendants being passed to the credit of Burn's account; but the exchequer bills themselves were never entered to Burn's credit. The defendants had no knowledge or notice that the bills were not the property of Burn. On the 1st of December 1836, Burn took the exchequer bills out of the box and gave them to defendants to obtain the interest and new bills, which was done on the 20th of December by the defendants. Burn was unwell when he delivered the bills to them, and afterwards grew worse, and was, in consequence, out of town three or four weeks; and was generally absent until his failure on the 23d day of January, up to which time the new bills remained in the possession of the defendants. When he failed he had largely overdrawn his account with the defendants and had drawn out and paid in large sums during the time the bills were in their hands. The exchequer bills were transferable by delivery. The plaintiff never knew who were Burn's bankers till he failed, nor did the defendants ever receive any information of any transaction between Burn and the plaintiff. The suit was brought for the new exchequer bills so received by defendants; and which had not been returned to Burn as above stated. The defendants claimed that they had a lien upon the bills for the general balance due to them from Burn. The Court of Common Pleas gave judgment for the plaintiff. TINDALL, C. J., admitted the general lien that bankers have upon the securities of their customers in their hands, unless there be some thing to show that such lien was not intended to arise; but he said this lien arises like other liens out of contract, and this contract being between the banker and the customer, could not take away the rights of other parties; and he thought that nothing had passed between Burn and defendants amounting to a representation that Burn owned the bills or that he had authority to pledge them. That had he pledged them, he would have been

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guilty of a statutable misdemeanor, and there was nothing to show that to be his intention.

The Court of Exchequer Chamber reversed this judgment. Lord Denman, C. J., delivered the opinion of the court and said that the right of bankers does not extend to all securities which may happen to be in their hands for any purpose, but to such only as come to their hands as bankers in the way of their business, and he considered that although the bills were delivered for a particular purpose, that purpose was the performance of a duty as bankers; and that they came to defendants' possession in the course of business. That negotiable securities, transferred by delivery to a *bona fide* holder for value, are deemed, with respect to such holder and to the extent of the rights acquired by him by the transfer, as the property of the person transferring, whether the transfer be express or implied; and the *bona fide* holder acquires a title which did not belong to the person who gave them to him. And that the defendants had a lien upon the bills for the general balance due to them from Burn.

The House of Lords reversed the decision of the Court of Exchequer Chamber. Lord Campbell delivered an opinion in which Lord Lyndhurst (Ld. Chancellor) briefly concurred. They disapproved of the doctrine laid down by Tindall, C. J., in the Court of Common Pleas, that the defendants had no lien because the bills did not belong to Burn. On this point they concurred with Lord Denman, that the bills being negotiable by delivery, that defendants had a right to consider them the property of Burn without any express representation by him to that effect. That the holder of negotiable securities is to be assumed to be the owner, and third persons, acting *bona fide*, may treat him as such; and that a lien in such cases may exist although the securities should turn out to be the property of a stranger. And as to the lien of bankers, they concurred with Lord Kenyon in *Davis vs. Bowsher* (*supra*). But they held there could be no lien in this case, because, under all the circumstances, these exchequer bills could not be considered as deposited with the defendants as bankers. That the defendants procured the new exchequer bills for

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the express and only purpose of delivering them up to Burn that he might deposite them in the tin box, which would give them no lien, and if they had no lien when they obtained them, no lien would afterwards be obtained by the overdrawing of Burn.

The case of the Bank of Metropolis vs. New England Bank, came before the Supreme Court of the United States twice. Once in 1843 (1 *How.* 234), and again in 1848 (6 *How.* 212). The Bank of the Metropolis in the District of Columbia, had been for a long time dealing and corresponding with the Commonwealth Bank of Massachusetts, which failed on the 13th day of January 1838.

They had mutually remitted for collection such bills, &c. as either might have which were payable in the vicinity of the other, which, when paid, were credited to the party sending them in the account current kept by both banks, and regularly transmitted from one to the other, and they regularly settled upon these principles, charging postage, protests, &c. &c. the balance being sometimes in favor of one and sometimes of the other. On the 24th of November 1837, the Bank of the Metropolis owed the Commonwealth Bank \$2200, and in the latter part of that year the Commonwealth Bank sent to the Bank of the Metropolis for collection in the usual way sundry paper which would fall due in February, March, April, May and June following. They were endorsed by E. P. Clarke, cashier, who was the cashier of the New England Bank, payable to C. Hood, cashier, who was cashier of the Commonwealth Bank, and by him to G. Thomas, cashier, who was cashier of the Bank of the Metropolis. On the day the Commonwealth Bank failed, its cashier wrote a letter to the Bank of the Metropolis directing it to hold the paper that had been so forwarded "subject to the order of the cashier of the New England Bank, it being the property of that institution."

The N. E. Bank sued the Bank of the Metropolis for the proceeds of all the paper sent, and the court below gave judgment for the N. E. Bank. The cashier of the Commonwealth Bank testified that they were never the property of the Commonwealth Bank, nor had that bank any interest therein, but they were, at

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the time of the receipt thereof and ever after, the property of the New England Bank and subject to its order and control. At this time the Commonwealth Bank was indebted to the Bank of the Metropolis about \$2,900. The notes, &c. were endorsed by the cashier of the N. E. Bank without consideration, and were placed in the hands of the Commonwealth Bank for the mere purpose of collection. On the cause coming back to the Supreme Court the second time, the court said the jury should have been instructed, that if upon the whole evidence; they should find that the Bank of the Metropolis at the time of the mutual dealings between them and the Commonwealth Bank, had notice that the latter had no interest in this paper, and transmitted it to the bank of the Metropolis for collection merely, as agent, then the Bank of the Metropolis could not retain it as against the New England Bank for a general balance due to the Bank of the Metropolis from the Commonwealth Bank. And if the Bank of the Metropolis had not such notice and regarded and treated the Commonwealth Bank as owner, still it could not retain the paper against the real owner unless credit had been given to the Commonwealth Bank or balances suffered to remain in the hands of the latter to be met by the negotiable paper transmitted or expected to be transmitted in the usual course of dealings between the two banks. But if the jury found that in their dealings the Bank of the Metropolis had regarded and treated the Commonwealth Bank as the owner of the paper so transmitted for collection, and had no notice to the contrary, and upon the credit of such remittances made or anticipated in the usual course of dealings between them, balances from time to time were suffered to remain in the hands of the Commonwealth Bank to be met by the proceeds of such negotiable paper, then the Bank of the Metropolis could retain said paper as against the New England Bank for the balance of account due from the Commonwealth Bank.

These cases declare the law within the jurisdiction of these courts of last resort, respectively. The principles they maintain applied to the principal case are fatal to the defendants. They received the note for collection merely. For, notwithstanding

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the words "for account" in the letter and which perhaps referred to the two items carried out, such was the testimony. It is to be supposed from their own practice and experience and from their knowledge of business generally, that they knew that a large amount of the paper they received from the Canal Bank was placed there for the sole purpose of collection. This was notice enough, to put them upon inquiry; and at least sufficient to prevent them from relying upon these notes as securities for advances or for a balance, and brings the case within the principles laid down in *Bank of the Metropolis vs. New England Bank (supra)*. Under such circumstances they were bound to know that, at most, they had no lien except upon paper owned by the Canal Bank. By the usual course of their dealings between the two banks, no credit was given for a note sent, until the defendants had collected it. The bank sending it could recall it any time; and when a note was dishonored it was immediately returned and the expenses charged. The defendants in this case, after the Canal Bank failed, took back what was uncollected by the Canal Bank, by them before sent to that bank.

But what seems wholly inconsistent with any implied contract for a lien, on every Monday all balances were paid up. This note was in the hands of the defendants between three and four weeks before the Canal Bank failed, and consequently the two banks squared all accounts two or three times during that time; and had not the Canal Bank failed, they would have settled and paid all up on both sides probably many times before this note became due. This wholly repels the idea of any contract for a lien, expressed or implied. The plaintiffs failed in *Clark vs. The Merchants' Bank*, because it was clear that the draft was not sent for collection but to be credited; and the defendants failed in *Brandão vs. Barnett*, because they received the bills (or the new ones in exchange) to return again, which was inconsistent with a lien, even as against Burn. In the case of the *Bank of Metropolis vs. New England Bank*, the court held the former must maintain a position similar to that of a *bona fide* purchaser, that is, for value and without notice. And *Brandão vs. Barnett* comes

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to nearly the same point. Here, as we have seen, the note was sent for collection merely, and by the course and practice of the business, it was to be returned when called for at any time before it was collected, and also if not collected.

Thus, in some important particulars, coming within the principles laid down in the cases to which I have already adverted. It may be added, that as against the plaintiffs in this cause, the defendants could not retain the note for a preexisting debt due from the Canal Bank (*Stalker vs. McDonald*, 6 *Hill*, 93).

So that suffering former balances to remain in the hands of the Canal Bank on the strength of such paper would not give to the defendants title as against the real owner, though perhaps it would be different in cases coming before the Supreme Court of the United States (*Swift vs. Tyson*, 16 *Pet.* 1).

And it would seem that the defendants may be treated by the plaintiffs as their agents (*Bank of Orleans vs. Smith*, 3 *Hill*, 560), unless the defendants are in a position to insist upon their mere legal title, on the ground that they are *bona fide* holders, in the sense of that term in this state, which we have seen is not the case. There must be judgment for the plaintiffs.

5 How. 171--See 6 How. 99.

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Several causes of action in slander can not be united in the same complaint, unless they are *separately stated*.

It seems that the *separate statement* of a cause of action, is equivalent to a *separate count*, under the former rules of pleading.

The words, "you have passed counterfeit money," &c., without any colloquium or averment, alleging a guilty knowledge and intention to defraud, will not sustain an action.

The words "you are a bogus peddler," without any averment showing the meaning of the term, are not actionable.

Words imputing that the plaintiff had had the pox, but without asserting the present continuance of the disease, and without alleging special damages, are not actionable.

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Schenectady Special Term, Nov. 1850. This was a demurrer to a complaint in an action of slander. The pleadings are sufficiently stated in the opinion of the court.

J. C. WRIGHT, *for Plaintiff.*

— McCHESENEY, *for Defendant.*

WILLARD, Justice.—The complaint in this case charges that the defendant, on the first day of May 1848, and on divers other days and times before that time and the commencement of this suit, at the town of Princetown in Schenectady county, and at the town of Guilderland in Albany county, maliciously spoke, uttered and published *to*, and of and concerning the said plaintiff the following false, slanderous and defamatory words. It then details three or four sets of words addressed *to*, the plaintiff and the like number spoken *of* him. The words relate to different subjects matter, and will be presently noticed. Each set of words appears to be a distinct cause of action, but they are all united in the same complaint, without being divided into separate counts or statements.

The defendant has demurred to so much of the complaint as imputes the speaking of the words referred to in the demurrer.

Before considering the questions which the parties have discussed under the demurrer, it will not be out of place to advert to other questions which were directly involved and which might have been raised.

I. The complaint is bad because it unites several causes of action, without stating them *separately*. The 167th section of the Code lays down the rule with respect to joinder in the same complaint of several causes of action. The causes of action, so united must all belong to the same *class*, of which the Code specifies seven; they must affect all the parties to the action; they must not require different places of trial; *and they must be separately stated*. I had occasion to consider this subject in *Durkee vs. The S. and W. Rail Road* (4 *How. Pr. R.* 226), and will not repeat what was then said. *The separate statement of a cause of action, and the separate counts of a declaration, are equivalent expres-*

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sions. The necessity of having each stated by itself in a different count, is as imperative, under the Code as under the former mode of pleading. By stating each separately, confusion is avoided, a definite issue can be framed on each cause of action, and the action can be more conveniently tried. All good pleaders under the Code, imitate the former mode of separating the pleading into as many *separate statements* or *counts* as there are causes of action. In the present case there are at least four causes of action jumbled together. The words spoken at Princetown to the plaintiff must be a different cause of action from that created by the words spoken to him at Guilderland. Each of these must be different from the words spoken of the plaintiff at the said places respectively. Indeed a far greater number of causes of action are alleged, but *four* is the smallest number to which they can be reduced.

Had the defendant demurred to the whole complaint for the reason that several causes of action were improperly united, as he might have done by § 144 sub. 5, he would have been entitled to judgment according to the case of *Durkee vs. S. and W. Rail Road, supra*. Several causes of action are improperly united, where they are not *separately stated* as required by § 167.

II. Under the former practice, the defendant would have been entitled to judgment on this demurrer, though for a different ground of objection, than those stated by him in his special demurrer. By the 145th section of the Code, this practice is changed, and unless the demurrer distinctly specifies the grounds of objection to the complaint, it may be disregarded. It may be taken to the whole complaint, *or to any of the alleged causes of action stated therein*. This shows that each cause of action should be fully stated by itself, as in a separate count.

The defendant in this case, has not stated as the ground of his demurrer, the improper uniting of several causes of action, and for that reason, judgment can not be given for him, for that defect in the complaint.

III. But the part of the complaint to which he has demurred, is set out; and if that part contains no cause of action, the defendant must be entitled to judgment.

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The first words objected to, as insufficient are, "you have passed counterfeit money;" "you are a bogus peddler." "You have passed counterfeit money to G. L., G. P., and J. Q. C.," giving the names. "He passed bogus money." "He passed ten dollars of bogus money to" &c. The first objection assigned in the demurrer is, that there are not facts enough stated to constitute a cause of action. The second objection is that no guilty knowledge is imputed to the defendant; and third, the money is not stated to have been passed upon any consideration received, with intent to have it passed, or with intent to defraud.

There is no colloquium in the complaint to point the meaning of the words; and no inuendo, or averment; and no special damages are alleged. There is nothing but the naked charge, as above stated.

The 164th section of the Code does not affect the present question. That section merely dispensed with the allegation of extrinsic facts, showing the *application of the words to the plaintiff*, in order to obviate the difficulty which was supposed to have been occasioned by the decision of the Supreme Court in *Miller vs. Maxwell* (16 *Wend.* 9). It does not dispense with the necessity of an averment or inuendo, when they become essential to show *the meaning of the words themselves*. In these respects the rules of pleading remain unaltered.

The rule with respect to verbal slander is thus stated by Star-
kie (*vol. 1, p. 37, Wendell's ed*), after reviewing the English authorities: "the words must impute some crime or misdemeanor, for which corporeal punishment may be inflicted in a temporal court, or they will not be actionable, without proof of special damage." The rule adopted in this state, at an early day, was thus stated by SPENCER, J., in *Moshier vs. Coffin* (5 *J. R.* 188): "Upon the fullest consideration we are inclined to adopt this as the safest rule, and one which, as we think, is warranted by the cases; in case the charge is true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, the words will be in themselves actionable." This rule has been ever since followed

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in this state (13 *J. R.* 124; *id.* 275; 19 *do.* 367; 3 *Hill*, 22; 4 *Barbour S. C. R.* 504).

In accordance with this doctrine it has been held that words like this: "You swore false;" "you took a false oath;" "he swore false, before Esquire Andrews;" "he swore to a lie;" will not sustain an action unless the declaration contains a colloquium showing that the words referred to a trial or other legal proceeding (*Vaughan vs. Havens*, 8 *J. R.* 109; *Chapman vs. Smith*, 13 *J. R.* 78; *Stafford vs. Green*. 1 *J. R.* 505; *Ward vs. Clark*, 2 *J. R.* 10). The reason is, that the words, standing alone, do not, as matter of law, impute a crime punishable in a temporal court. A man may swear false without having taken an oath in any court; and he may swear false in a court of record, in a point not material, without incurring the guilt of perjury. There is no hardship in requiring the plaintiff to state in his complaint those circumstances which point the meaning of the words, and the intention of the speaker. These are issuable facts as may be seen by the case of *Cruikshank vs. Gray* (20 *J. R.* 344). The fact that the Code dispenses with the averment of extrinsic facts, heretofore necessary to point the application of the words to the plaintiff (*Code*, § 164), justifies the inference, that in other respects, the rule formerly prevailing, remains unchanged.

Testing the complaint by the foregoing rules of pleading, it does not contain a cause of action. The mere passing of counterfeit money, without a knowledge of its quality, and without an intention to defraud, is not criminal. The court can not say, as matter of law that the words in this case impute a crime. No adjudged case has been cited, in which these words, standing alone, have been held actionable; and the contrary has been held in Mississippi, in direct terms (*Church vs. Bridgman*, 6 *Miss.*, 190).

The words "bogus peddler," do not necessarily impute any crime. The term has no fixed legal meaning. Whether a *bogus peddler* is one who deals in counterfeit money or wooden nutmegs, or in tin ware, is uncertain. The words have not acquired by usage such certain signification as to enable the court to say as matter

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of law, that they designate a man engaged in a business which the law denounces as criminal. I grant that words may acquire a sense different from their natural import; or words, apparently harmless, may by usage come to convey to the mind the imputation of a definite offence. But in all such cases, the fact that the words impart such meaning, should be averred by the pleader; and also, that they were so understood by the hearer. When words are spoken in a foreign language, it must be averred that the hearers understood such language (1 *Saund.* 242, n.; 3 *Wend.* 394). The meaning of the words thus became a subject of evidence, and must be passed upon by the jury. So, also, when the words are equivocal or uncertain, there must be an appropriate colloquium and averments, which are the subject of proof (*Goodwin vs. Wolcott* 3 *Cowen* 231; *S. C. in Error*, 5 *do.* 714; *Gorham vs. Ives*, 2 *Wend.* 534; *Gibson vs. Williams*, 4 *do.* 320; *Woolnoth vs. Meadows*, 5 *East.* 463). Testing the complaint by these principles it is bad. The words, as charged, do not impute any crime to the plaintiff, and there is no averment or colloquium under which the application of the words could be pointed by proof of extrinsic evidence.

The remaining part of the complaint seeks to recover damages for charging that the plaintiff, at some former period had had the pox. The demurrer assigns for cause that the words do not impute that the disease was contagious, or that the plaintiff had the disease at the time the words were spoken, and that no special damage is alleged. It is unnecessary to repeat the disgusting language which the defendant is said to have uttered. It was all used in the past tense, and none of it imputed that the plaintiff was, at the present time, afflicted with that disease. No special damage is alleged in the complaint. It is clearly bad, and the demurrer is well taken (1 *Starkie on Slander*, *Wend. ed.* 99, *et seq.*

Judgment for the defendant on the demurrer, with leave to the plaintiff to amend on payment of twenty-one dollars costs.

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SUPREME COURT.

NEW YORK AND ERIE RAIL ROAD CO. agt. COREY and SMITH.

Upon the presentation of the petition, for the appointment of Commissioners of Appraisal of damages in taking land for a Rail Road, is the proper time to raise questions of regularity in the proceedings. Such as, the petition is not properly verified, or that it does not appear by the petition that the commissioners have been unable to agree with the owner of the right of way for the purchase, &c. It is too late to raise such objections on motion for confirmation of the commissioners' report.

Where the commissioners make a report to the court, and by an order are permitted to amend or correct it so as to conform it to the state of facts which existed, they have no right at the time of such correction to hear proofs by claimants as to damages. When they have viewed the premises and decided upon the amount of damages to be paid, their powers under their appointment are exhausted, so far as the amount of damages is concerned, until the further order of the court.

Where it appears that the commissioners have been regular in their proceedings; and due notice of the motion for confirmation has been given, it is a matter of course (and required under the act of April 2, 1850, *L. of 1850*, p. 211, § 17), to confirm the report.

The party deeming himself aggrieved by the decision of the commissioners must bring the matter before the court on appeal (under the act, *supra*). And upon such appeal the court can look only at the matters contained in the report as the foundation of any order to be made upon the appeal. Ex parte affidavits and papers can not be received.

It seems, therefore, that claimants for damages, in presenting their objections, have no redress (unless by leave of the commissioners), where they fail to appear at the time appointed by the commissioners to view the premises and award damages, where the proceedings are all regular on the part of the commissioners.

Monroe Special Term, Oct. 1850. Motion to confirm report of Commissioners of Appraisal. At the late general term of this district the commissioners who had been previously appointed to appraise the damages of the claimants in consequence of the rail road company running their road over their land, having made their report, the counsel for the company moved for its confirmation, under the provisions of the act entitled "an act to authorize the formation of rail road corporations, and to regulate the same," passed April 2, 1850 (*Laws of 1850*, p. 211). In that report the commissioners, among other things, stated that

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"having viewed the premises described in said petition, *and having heard the proofs and allegations of the parties,*" &c. determined the amount to be paid by the company, &c. No minutes of testimony accompanied the report, and on that ground the general term denied the motion to confirm the report. But on a suggestion on behalf of the company that no evidence was taken by or offered to the commissioners, and that the statement in their report in relation to proofs being heard by them was inserted by mistake in consequence of a printed blank being used containing words to that effect, and that they decided the question of damages upon a view of the premises alone, a clause was allowed to be inserted in the order granting the company leave to withdraw the report, and that the same be corrected by the commissioners, with leave to renew the motion.

The motion is now renewed upon a corrected report of the commissioners in which the word "proofs" is stricken out, and stating that the parties did not produce any witness or proofs.

J. WOODS and N. FINCH, *for the Company.*

W. M. HAWLEY, *for Claimants.*

WELLES, Justice.—It is now objected that the petition upon which the commissioners were appointed, was not properly verified; also that it does not appear by the petition that the company had been unable to agree for the purchase of the right of way in question. Without stopping to consider or discuss these objections upon their merits, it is sufficient to say that they come too late. When the petition for the appointment of the commissioners was presented, was the proper time to raise objections of this character. They do not go to the merits of the case and merely affect the question of regularity. One object, I suppose, of requiring ten days notice of the presentation of the petition, was to afford an opportunity to raise questions of this character.

A large amount of testimony in the form of *ex parte* affidavits by the claimants and others is produced, tending strongly to show that the sum of \$450, awarded by the commissioners is entirely

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insufficient to indemnify the claimants for their damages on account of the road passing over their land.

The affidavits of the claimants also show that they were neither of them personally served with notice of the presentation of the petition for the appointment of the commissioners. That they were both absent from home on a journey to the state of Pennsylvania when such notices were served by leaving the same at their dwelling houses in their absence, and that they did not arrive home until the night of the day upon which the application was to be made. That they resided about sixty eight miles from the place where the applications were to be and were made, and that it was impossible for them to get there in time to be present when the motion was made. That they did not appear upon the motion in person or by attorney, and had no knowledge except by report who the commissioners were, or that any had been appointed; or that a time and place had been fixed for the meeting of the commissioners, until more than two hours after the hour had elapsed for their meeting. That after the commissioners had met for the purpose of determining the amount to be paid to the claimants by the company they accidentally heard of such meeting and one of them went before the commissioners and objected to their proceeding, alleging that he had received no notice of their meeting and was unprepared to proceed at that time, stating that he was without counsel and unacquainted with the proceedings. That the commissioners proceeded to view the premises, &c., and after viewing the same, one of them asked the claimant whether he had any remarks to make upon the subject, to which he replied that he knew nothing of the proceedings and did not know what to say or to do, or how to protect his rights, and objected to their proceedings for the reason that he was ignorant of his rights and had no counsel. That the commissioners consulted a few minutes together and then informed the claimant so appearing before them that they had agreed and fixed the amount of damages at \$450.

The papers furthermore show, that when the commissioners met to correct or amend their report in pursuance of the rule of

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court, the claimants had reasonable notice thereof, the notice stating that the commissioners would then and there hear proofs as to damage in case the claimants saw fit to offer such proofs. None were then offered, however for the reason as alleged that the claimants did not arrive in season, they supposing the commissioners were bound to wait an hour.

If the commissioners had a right to hear proofs at their meeting to correct their report, I should hold that the reason offered by the claimants for not offering it, was insufficient. They were not necessarily bound to wait an hour, or any other time after the time appointed, before proceeding to their work. The notice was for one o'clock, and if the claimants wished to be present, they should have been there at their peril. But I shall lay out of view entirely every thing in relation to that meeting of the commissioners, in considering the present application of the claimants for relief, or rather their objections to a confirmation of the report. It would have been a nugatory proceeding by the parties and the commissioners if proofs had been offered and received after the first report. When the commissioners had viewed the premises and decided upon the amount of damages to be paid, their powers under their appointment was exhausted so far as the amount of damages was concerned, until further orders by the Supreme Court. They had made a report, which for a defect of form was sent back for correction. The order allowing the amendment did not allow further proof to be taken nor the question of the amount of damages to be opened in any way.

The question then is, whether this court in any case where the company is regular and in a situation to ask to have a report of commissioners of appraisal confirmed, has a right to deny or refuse such confirmation.

I think a strong case is made on the part of the claimants for the exercise of such power in case the court possesses it. The claimants were absent on a journey on business in another state from a time previous to the service of notice of motion to the court for the appointment of commissioners until too late a period for them to appear on the motion personally or by attor-

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ney. The act requires the court, when they appoint the commissioners, to fix the time and place of their first meeting. The act does not require notice to be given to the owner, &c. of the land, of the time and place of the meetings of the commissioners when such time and place is thus fixed by the court.

In this case it appears that the claimants accidentally heard of the commissioners being met on or near the premises in question for the purpose of viewing the same and of determining the amount of compensation to be paid, &c., and that one of them appeared before the commissioners and informed them he was not ready to proceed with the matter. It would seem that the claimants were taken by surprise and were ignorant of their rights or what to do, in order to protect them. It does not appear that they in form requested an adjournment, although perhaps what they did, amounted in effect to such request; and I confess I should have been better satisfied if the commissioners had adjourned the matter to a subsequent day to give the claimants an opportunity of presenting their proofs, &c.

If the facts and considerations presented now on behalf of the claimants in opposition to the confirmation of this report could be urged or listened to on an appeal under the 18th section of the act, I should have no hesitation in confirming this report. But we have held at the last general term, in substance, that upon such appeal we can only look at the matters contained in the report as the foundation of any order to be made upon the appeal. That the appeal is a review merely of the proceedings and decisions of the commissioners, and if they are erroneous or illegal, or if it appears that injustice has been done to the party appealing, a new appraisal will be ordered. But such cause must appear by the report itself and can not be shown by *ex parte* affidavits. If, therefore, any relief can be granted it would seem that this is the only occasion upon which it can be given.

The 17th section of the act requires that "on such report being made by said commissioners, the company shall give notice to the parties or their attorneys to be affected by the proceedings, according to the rules and practice of said court, at a general or

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special term thereof, for the confirmation of such report; *and the court shall thereupon confirm such report*, and shall make an order," &c.

The 16th section defines the duty of the commissioners. The same section requires the commissioners to make a report to the Supreme Court of the proceedings before them, with the minutes of the testimony taken by them, if any; and it is that report, which, by the 17th section, the court *shall* confirm. These sections, I think, show that when it appears that the commissioners have been regular in their proceedings, and due notice of the motion for confirmation has been given, it is a matter of course to confirm the report. The party deeming himself aggrieved by the decision of the commissioners must bring the matter to the notice of the court by appeal. I am not able to perceive that there exists for him any other remedy. It is evidently all the statute contemplates. I have sought diligently to find some way of relief for the claimants in the present case but without success. It was their misfortune to be absent when the notice was given for the appointment of the commissioners and that they remained in ignorance of the proceedings which were going on until it was too late for them to take the necessary steps to bring the facts before the commissioners which they now set up in their affidavits, or that they did not, upon proper affidavits, move the commissioners for adjournment to enable them to do so. If when they returned from their journey to Pennsylvania and found the notices of motion for the appointment of commissioners at their dwelling houses, they had taken immediate steps to learn what had been done by the court, they would have ascertained the time and place of the first meeting of the commissioners, which was specified in the order appointing them. If this had been done, the matter would probably have been placed in a situation which would have enabled the claimants either to obtain such an appraisal as they would have been satisfied with, or to have brought the subjects of complaint before the court on appeal.

Much as I should be gratified to be able, upon the papers now before me to give relief to the claimants, I can not consent to

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strain the power of the court beyond the bounds to which the statute has plainly confined it.

I can see no alternative, therefore, to directing an order confirming the report of the commissioners.

5 How. 188—CITATIONED, 30 Barb. 159; 20 How. 62. FOLLOWED, 13 Hun 150, 152.

SUPREME COURT.

BREWSTER agt. THE MICHIGAN CENTRAL RAIL ROAD COMPANY.

To authorize legal service of summons and complaint upon a foreign corporation, where it is made upon its *managing agent* in this state (under § 134 of the Code). The managing agent must be one whose agency extends to *all* the transactions of the corporation—one who has, or is engaged in, the management of the corporation in distinction from the management of a particular branch or department of its business.

Where service of a summons is made upon a proper officer of a foreign corporation—no attachment having been issued and no voluntary appearance by the corporation—the courts of this state do not get jurisdiction of the defendant, so as to render a personal judgment (Hulbert agt. The Hope Mutual Ins. Co., 4 How. Pr. R. 275). The extent of their power, is, to subject the property and effects of such corporation within this state, to the payment of its debts by a judgment *in rem*, after such property and effects have been attached, according to the directions of *ch. 4 of tit. 7 of the Code*.

Monroe Special Term, Oct. 1850. Motion on the part of the defendant to set aside the judgment and execution and all proceedings subsequent to the issuing of the summons and complaint. The defendant is a foreign corporation created by the laws of Michigan. The action was commenced by summons and complaint, which the plaintiff claims was on the 17th day of May 1850, served upon the managing agent of the defendant in the city of Buffalo. On the 12th day of June following, the plaintiff perfected judgment against the defendant generally in the clerk's office of Monroe county, upon an affidavit of service of the summons and complaint and that no answer had been received, for \$322.00, together with \$7.50 costs. The affidavit stated "that the deponent did, on the 17th day of May last serve upon the Michigan Central Rail Road Company, defendant in the foregoing action, the foregoing sum-

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notes and complaint. That such service was made on the dock by the warehouse and office of such defendant in the city of Buffalo, by handing them there to John G. Reed, the managing agent of such defendant in Buffalo, a copy of such summons and complaint. That this deponent knew the said Reed to be the managing agent of such defendant described in said summons and complaint by inquiry and information, as well as by a brief acquaintance with him, and seeing him engaged in conducting the business of said defendant; and this deponent not only delivered said copy summons and complaint to him, but left the same with him and in his keeping," &c.

The complaint was upon a contract and demanded judgment for \$322.00. The judgment was entered by the clerk without proof and without any reference to ascertain the amount due and without issuing a writ of inquiry.

On the 17th day of June 1850, an execution was issued upon the judgment against the property of the defendant generally, to the sheriff of Erie county; no attachment has been issued in the action in pursuance of ch. 4 of title 7 of the Code. This motion was founded upon the judgment roll, together with affidavits of John G. Reed, upon whom the summons and complaint were served, and others.

Reed states in his affidavit that he was not, at the time the summons and complaint were served, and never has been, the managing agent or any officer of the defendant. That he never has had any agency for or been in the employment of the defendant, excepting as follows: That at the time of making the affidavit (2d July 1850), and for more than a year then last past, there has been a voluntary association called "The Michigan Central Rail Road Line," composed of the defendant and Eber B. Ward and Samuel Ward, whose business consists of running steam boats for carrying passengers and freight on Lakes Erie and Michigan. That at the time of the service of the summons and complaint, he the said Reed, was and still is the agent of the said association at Buffalo for the purpose of conducting so much of its business at Buffalo as relates to carrying passengers,

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and for no other purpose. That for the freight business of said association there was another person who was then and still is the agent of said association at Buffalo. and that for the different branches of the business of said association there were then and now are various persons acting as its agents at various ports on the lakes aforesaid.

Affidavits are produced on the part of the plaintiff tending to show that Reed was in the employment of and paid by the defendant in his agency for the "Michigan Central Rail Road Line," which is alleged to be not a partnership, but an arrangement between the defendant, owning the Michigan Central Rail Road in the state of Michigan and the steamer May Flower, one of the boats in the line, and Messrs. Ward and others, owning the other steamers in the line. That there has been no community of interest between the parties to the association, the defendant receiving the earnings of the rail road and the steamer Mayflower, and the owners of the other steamers of the line receiving their earnings. In the counter affidavits Reed is spoken of as managing agent at Buffalo of the defendant, and it is alleged that he admitted himself to be such managing agent.

JAS. M. SMITH, *for Defendant.*

E. A. HOPKINS, *for Plaintiff.*

WELLES, Justice.—The service of the summons and complaint in this case is supposed by the plaintiff's counsel to have been in pursuance of § 134 of the Code. That section provides that if the suit be against a corporation, the summons shall be delivered to the president, or other head of the corporation, secretary, cashier, or *managing agent thereof*. The service in question was upon an individual, who assuming the facts as contended for by the plaintiff, was at most an agent for the defendant in a particular department of its operations, and whose powers must have been comparatively very much limited in their scope and object, and probably confined to the particular department of the business in which he was employed. It seems to me he can not

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be regarded as a *managing agent* of the corporation within the meaning of the section of the Code referred to. He was not a managing agent of the corporation. The most that can be said of him is that he was employed in a particular branch of the business transacted by the defendant, with powers to employ other persons as assistants, and perhaps with other incidental powers to enable him to carry into effect the general object of his particular agency; and perhaps also with powers to bind the defendant by his contracts. But it seems to me all this could never constitute him a managing agent of the defendant in such a sense as to render service of the summons upon him a good commencement of an action against the defendant. Every employment of another is an agency in the general sense of the term; and whenever such employment is accompanied by any discretion in the agent, he may be said to be, in such general sense, a managing agent.

An attorney for a bank or other corporation has demands put into his hands to collect, with discretionary power in regard to their management, as when and how to prosecute, or to compromise for the same, &c. &c. In such case the attorney for the bank would be as much the managing agent of the corporation appointing him as Reed in this case was the managing agent of the defendant. They were both in the employment of their principals and both had certain discretionary powers. The attorney was the managing agent of his employer in collecting or securing the demands put into his hands, and Reed was the managing agent of the defendant to procure business for the line of steamers and the rail road; and yet it could be pretended that an action could be commenced against the bank or other corporation in the case supposed by service of the summons on the attorney? Most clearly not. The managing agent upon which the summons may be served, must be one whose agency extends to all the transactions of the corporation; one who has or is engaged in the management of the corporation, in distinction from the management of a particular branch or department of its business.

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This, I apprehend, is the only safe rule that can be adopted; once depart from it, and I see not why a suit may not be commenced against a corporation by serving the summons on any one who has, at the time, the most trifling agency committed to him; no matter how special or limited, provided he be vested with any discretion to manage the business of his agency. A merchant in Detroit on going to New York might be authorized by this defendant to contract in its name for an iron safe, with discretion as to kind, price, and time of payment. He, for the time being, would be a managing agent, and if the construction contended for be correct, service of the summons upon him would be a good commencement of an action against the defendant. Illustrations might be multiplied indefinitely, to show the danger and impropriety of such a latitudinarian interpretation of the statute. I am clearly of the opinion that the service of the summons and complaint in this case upon Reed as the managing agent of the defendant was irregular and void.

This view of the case is sufficient to dispose of the motion; but there is another, in my judgment, equally fatal to the plaintiff's proceedings. The defendant is a corporation created by the laws of the state of Michigan. The judgment entered is a general one, in the nature of a judgment *in personam* against the defendant, and the execution is issued against the property of the defendant generally. Under it the sheriff is bound to take any property of the defendant, real or personal, which he can find in his bailiwick, sufficient to make the amount. No attachment has been issued, and there has been no voluntary appearance of the defendant in the action. In *Hulburt vs. The Hope Mutual Ins. Co.* (4 How. Pr. R. 275), Mr. Justice SILL has shown in a very able and clear opinion, that in such a case, the courts of this state can not obtain jurisdiction of the defendant so as to render a personal judgment. The extent of power of the court over a foreign corporation where there has not been a voluntary appearance in the action, is to subject the property and effects of such corporation within this state to the payment of its debts, by a judgment *in rem* as to such property and effects, after the same

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has been attached, before the judgment is rendered, according to the directions of ch. 4 of title 7 of the Code.

The service of the summons with all subsequent proceedings on the part of the plaintiff, including the judgment and execution, must be set aside with \$10 costs.

SUPREME COURT.

LINDEN AND FRITZ, agt. HEPBURN AND WILLS, IMPEADED WITH WEST.

Where a lessee for a term of years demises the premises to a sub tenant with a reservation of rent to him, and a right to reenter in case of a breach of the covenants—the covenants also binding the sub tenant to observe and keep the conditions of the original lease—such demise is to be regarded, as between the lessee and the sub tenant, as a sub lease, and not an assignment of the original term. The reservation of the right of reentry, is sufficient to enable the lessee to enter for breaches of the conditions, although there be no reversionary interest in him.

A complaint demanding judgment of forfeiture of a term of years in a lease, also praying for an injunction to restrain the defendant from making alterations, &c. in the demised premises, is a judgment and a relief called for totally inconsistent with each other. Either may be pursued separately, but not both at once. The Code has not changed the inherent difference between legal and equitable relief. Although it has abolished the distinction between legal and equitable remedies.

December 1850. Before OAKLEY, Ch. J., and SANDFORD and PAINE, Justices. This case came before the court on an appeal from an order granting an injunction, and on another appeal from a judgment in favor of the plaintiffs on a demurrer to the complaint.

The case made by the complaint, was as follows: J. H. Rosevelt leased to A. & F. Roux, for eight years from May 1, 1845, the premises 478 and 480 Broadway, in New York. The lease was on the express condition that the premises were to be used only in a certain manner, and that certain enumerated uses should not be made of them; and there were covenants against making any alterations in the buildings, and a provision for reentry for

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breaches of the conditions of the covenants. A. & F. Roux transferred the lease to the plaintiffs in March 1848, who demised the principal part of 480 Broadway, to the defendant West, for five years from May 1, 1848, who covenanted to observe and keep all the covenants and conditions in Rosevelt's lease. The lease to West reserved the rent to the plaintiffs, and provided for their reentry for breaches of its covenants. Hepburn & Wills entered under West; and the defendants, or some of them, have broken the conditions of the lease in four specified particulars. The plaintiffs thereupon claimed that the lease to West had become forfeited, and prayed for judgment as stated in the opinion. The defendants Hepburn & Wills demurred, and the judge at special term gave judgment for the plaintiffs. He also on a previous motion, granted an injunction order, restraining the defendants from continuing some of the inhibited uses of the premises

J. COCHRANE, *for the Defendants.*

J. M. KNOX, *for the Plaintiffs.*

By the Court, SANDFORD, J.—The only ground presented by the demurrer, which requires any serious consideration is, that no right of entry exists in the plaintiffs; that the lease executed by them to West, operated as an assignment of the original lease, *pro tanto*; and there being no reversionary interest in the plaintiffs they can not recover. Whatever the effect of this lease might be as between West and the original lessor of the demised premises, we have no doubt that as between West and the plaintiffs, it is to be regarded as a sub lease, and not as an assignment of the original term. The right to reenter was reserved to the plaintiffs, and suffices to enable them to enter for breaches of the conditions, although there be no reversion remaining in them (*Doe, ex dem. Freeman vs. Bateman*, 2 *B. and Ald.*, 168; and see *Kearny vs. Post*, 1 *Sandf.* 105, affirmed on appeal, 2 *Comst.* 394). The judgment for the plaintiffs on the demurrer, must be affirmed with costs.

On the appeal from the order granting the injunction, a different question arises. The complaint, after setting forth the viola-

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tions of covenants and conditions for which the plaintiffs seek to recover, prays for a judgment of forfeiture of the term of years, that the defendants be for that cause dispossessed and that the plaintiffs be put into possession of the premises. It then prays for an injunction to restrain the defendants from making alterations in the buildings, and from using them for retailing liquors, and in other modes prohibited by the covenants in the lease. The forfeiture and reentry prayed, are the relief heretofore granted in the action of ejectment brought for the recovery of demised premises. The injunction asked, is purely equitable relief, heretofore given in a chancery suit, and in conformity to the principles of equity. The ejectment brought to effect a reentry for breaches of the condition in a lease, has always been regarded in the law as a hard action—one *strictissimi juris*; and the English chancery reports abound in cases in which the courts of equity have been importuned to relieve tenants against the forfeitures claimed in such actions. A proceeding like that before us, would never have been thought of under the system of remedies in force prior to the code of procedure. Equity abhors forfeitures and always relieves against them, when possible to do so; and no man would have ventured, under that system, to ask her for one of her most benign remedies, while, in the same breath, he demanded from her a rigorous forfeiture of his opponent's estate, in the subject of the controversy.

Does the code of procedure make any change in this respect? Can a plaintiff, under the Code, ask for equitable relief, and in the same suit, demand a forfeiture? We are clear that the code has not altered the rule. It has abolished the distinction between legal and equitable remedies; but it has not changed the inherent difference between legal and equitable relief. Under the code the proper relief, whether legal or equitable, will be administered in the same form of proceeding. In some cases alternative relief may be prayed and relief be granted in one or the other form; in which cases an action at law was necessary before, to attain the one form, and a bill, in equity to reach the other. A suit for specific performance is one of that description. But we think

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inconsistent relief can no more be asked now than it could under the old system. A vendor can not now exhibit a complaint demanding payment of an instalment of purchase money in arrear, and also a forfeiture of the contract of sale, and restoration of the possession, even if the contract expressly provided for such payment and forfeiture. There can be no better illustration of our meaning than this very case. The forfeiture of the term, is a relief totally inconsistent with any equitable remedy. The lessor may pursue his remedy for a reentry and possession; or he may proceed for an injunction and damages, leaving the tenant in possession. He has an undoubted option to do either. He can not do both at once. "He that seeks equity must do equity," is a maxim which lies at the foundation of equity jurisprudence, and it is not at all affected by any change of remedies.

We imagine that a much broader effect has been claimed for the abolition of the distinction between legal and equitable remedies, than was ever intended by the legislature. The first section of the code shows what was intended by the word "remedies." It is limited to actions and special proceedings, and the declared object of the preamble to the code is simply to abolish the distinction between legal and equitable actions. There is no ground for supposing that there was any design to abolish the distinction between the modes of relief known to the law as legal and equitable, or to substitute the one for the other, in any case. Those modes of relief, the judgment or the decree, to which a party, upon a certain state of facts, was entitled, were fixed by the law of the land. No inference or deduction from a statute, nothing short of a positive enactment by the legislature, could change them. The code contains no such enactment; and we repeat, that we do not perceive in it any countenance for an inference or deduction to that effect. The chapter of the code relative to injunctions, in our judgment, does not affect the question. It substitutes an order for the writ heretofore used, and it defines the cases in which it may be granted; the latter being the same, substantially, as were established in our Court of Chancery. It does not profess to create a new remedy. On the contrary, it

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recognizes the injunction as an existing provisional remedy; provides the order in place of the writ, and regulates the mode of granting it. Its character, as a mode of equitable relief, is not at all altered or impaired.

Our conclusion is, that the plaintiffs, had no right to an injunction, while they demanded a forfeiture of the lease. As the case made by the complaint would entitle them to an injunction, if their relief had been limited to that remedy, together with damages, we will permit the injunction to stand, on their stipulating not to take judgment for a forfeiture, or delivery of possession of the premises; and they may amend their complaint so as to ask for damages. Unless they thus stipulate, the order for the injunction must be reversed.

SUPREME COURT.

BURGET agt. BISSELL.

The statement of facts and circumstances, comprising matters which under the former practice, would have formed sufficient ground of relief against a strictly legal demand, upon a proper bill filed for that purpose, may now be interposed by the defendant directly by way of answer in an action commenced to recover the legal demand.

Such matters will not be stricken out, as irrelevant or redundant, where it appears they would not have been obnoxious to exceptions for impertinence, according to the rules of equity pleading.

Yates Special Term, January 1851. Motion to strike out a large portion of the defendant's answer, for irrelevancy and redundancy The complaint is in trespass for taking and carrying away 400 sticks of pine timber of the value of \$4000, &c. The answer first denies the taking of the timber, and second alleges the title of the timber to be in the defendant, and then proceeds to state how such title arose. This statement of the manner the defendant acquired his title to the timber in question, contains about 26 folios, and is what the plaintiff asks to have stricken out.

R. CAMPBELL, *for Plaintiff.*

J. HEBON, *for Defendant.*

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WELLES, Justice.—It is claimed by the defendant's counsel, that the portion of the answer which is asked to be stricken out, presents an equitable defence to the action. If this be so, I think the answer ought to be permitted to stand. I have no doubt but that any matters which under the practice as it existed before the Code, would have formed sufficient ground of relief against a strictly legal demand or claim, upon a proper bill filed for that purpose, may now be interposed by the defendant directly by way of answer in the action commenced to recover the legal demand.

The object of the plaintiff's counsel to that portion of the answer, which he asks to have expunged, is that it states the evidence of the facts upon which that branch of the defence arises, in minute detail; that it contains the facts and circumstances which merely go to establish, or from which the defendant will ask to have inferred, the material facts which constitute the defence, and that it contains matters irrelevant and redundant.

On supposition that the part of the answer in question, presents a mere legal defence to the action, the objection would seem to be well founded (*Shaw vs. Jayne & Brown*, 4 *How. Pr. R.* 119; *Knowles vs. Gee* and others, *Id.* 317). On the other hand, if as the defendant's counsel contends, it presents a case for the application of equitable rules, no part of it should be stricken out, unless under the former practice in courts of equity, it would have been liable to exceptions for impertinence. It should, upon the hypothesis mentioned, be treated in this respect, in the same way that a bill for relief against an unconscientious legal demand would have been treated under the former practice.

In such case, the plaintiff was at liberty to state any matter of evidence in his bill, or any collateral fact, the admission of which, by the defendant, might have been material in establishing the general allegations of the bill as a pleading, or in ascertaining or determining the nature and the extent, and the kind of relief to which the plaintiff might have been entitled, consistently with the case made by the bill; or which might legally have influenced the court in determining the question of costs; and where any allegation or statement contained in the bill might thus have

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affected the decision of the cause, if admitted by the defendant, or established by proof it would have been held relevant and could not have been excepted to as impertinent (*Story's Eq. Pl.* § 268; *Hawley vs. Wolverton*, 5 *Paige's R.* 522; *Mechanics' Bank vs. Levy*, 3 *Id.* 606; *Del Pont vs. De Tastet*, 1 *Turner & Russell*, 486). According to the rules of equity pleading, I do not think this answer would be obnoxious to exceptions for impertinence. Does it then set up a legal or an equitable defence? In the view I am about to take, it is not necessary to decide the question definitely upon this motion.

One of the evils which the late reforms was intended to cure, was that of the uncertainty attending a prosecution in a court of justice, in regard to the proper forum in which the party should seek redress for an alleged grievance. That in the disagreements between the courts of law and equity upon questions of jurisdiction, he was liable, after great delay and expense, to be turned out of court, on the ground that he had mistaken his forum; that he had brought his action at law, when his case belonged to the other side of the hall, or *vice versa*. It was alleged that instances had occurred, where a suitor had been turned out of the Supreme Court, because the matter was held to be a proper subject of equity jurisdiction; and afterwards the same party had been defeated in chancery by a decision that it was a matter, not for that court, but for a court of law.

To remedy such evils, among other things, was the object of the 69th section of the Code, abolishing the distinction between actions at law and suits in equity, and of the various sections of tit. VI. of the second part of the Code, which relate to proceedings in civil actions, § 140 to 177, inclusive. The plaintiff may now set forth his case in his complaint, in ordinary and concise language, &c. and the court is to administer the redress to which by his allegations and proofs, he may show himself entitled, whether by the rules of the common law or the principles of equity. The only difference in the mode of stating the case between an action founded upon legal principles and one resting upon the rules in equity, is that generally in the former, the facts to be stated in the complaint are such as by the common law

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rules of pleading the declaration was required to contain; that is, issuable facts, essential to the cause of action; and not those facts and circumstances, or the evidence of facts, which merely go to establish such issuable facts, while, in the latter, the plaintiff is at liberty to follow the rules of pleading formerly prevailing in the Court of Chancery, in reference to the bill.

These views, however, must be taken as applicable only to cases where the question is clear as to whether the party's remedy is at law, or in equity, as in the cases of *Shaw vs. Jayne* and *Brown*, and *Knowles vs. Gee* and others, before referred to. But in the case of any serious doubt whether the action belonged to legal or equitable cognizance, to apply the rules above stated, to the pleading, and to strike out on motion, matters as redundant, which, if the case was clearly of equitable cognizance, would be retained, would be to defeat, in a great measure, the object of the constitution and the code of procedure, in the amalgamation of the courts of law and equity, and the abolition of the distinction of actions. If the case, being stated in view of the rules of equitable pleading as above defined, turns out to be one of legal cognizance, the only evil consequence would be the loading the record with unnecessary matter, which would be a far less one than the exclusion from the pleading of matters which it ought to contain, in order to the full and advantageous examination and decision of the case as an equitable action, should that turn out to be its character.

In the present case, I am not prepared to say that the answer does not present an equitable defence; or rather, if it presents a defence at all, it is not, to some extent at least, of equitable jurisdiction. Whether it is a defence in either aspect, is not a question here, unless indeed, it can be regarded a sham or frivolous answer, which I do not understand is contended. Its sufficiency as a defence can only be tested in the present stage of the action by demurrer. The motion is therefore denied; but inasmuch as it has involved an examination of questions not entirely settled in the court, and about which there is understood to be some contrariety of opinion, if not conflict of decision, I am disposed to deny costs of opposing the motion.

Hernstien agt. Matthewson.

SUPREME COURT.

HERNSTIEN agt. MATTHEWSON.

Although the Code authorises an attachment to issue, against a non resident, in any action for the recovery of money, whether for a wrong or on contract, it is only in the latter case that a suit can be commenced, unless the defendant can be served with summons within this state.

In the case of an attachment for a *tort*, where the defendant does not voluntarily appear, there is no provision whatever for commencing a suit, or proceeding to judgment and execution. Consequently the attachment upon the property of the non resident should be discharged.

Whether the court should construe such an attachment as a means of compelling an appearance merely. *Quere?*

New York Special Term, Oct. 1850. On an affidavit setting forth that this was an action for a tort and not arising on contract, against a non resident defendant against whom an attachment had issued, and who had refused to appear in the suit except for the purposes of this motion,

MR. RUSSELL, *for Defendant*, moved that the attachment be discharged.

MR. BUSTEED, *Contra*.

EDMONDS, Justice.—It is true the Code has allowed an attachment to issue against a non resident defendant, in every action whether for a wrong or on contract, but unfortunately has provided no mode in which such a suit can be commenced or carried to judgment. Under the Revised Statutes in such cases, the attachment was the commencement of a suit and on that judgment might be perfected. But under the Code there is but one mode of commencing a suit and that is by serving a summons, the attachment not being allowed any longer to be a mode of commencing a suit.

Section 227 allows an attachment to issue "in an action for the recovery of money." By section 127, civil actions shall be commenced by the service of a summons. By section 133 it may be served personally in any county in this state; and by section 135, where the defendant can not, after due diligence be found

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within the state, the summons may be served by publication, among other cases, where the defendant is a non resident, but has property in the state, and "*the action is on contract.*"

So that though an attachment may issue in any action for the recovery of money, whether for a wrong or on contract, it is only in the latter case that a suit can be commenced unless the defendant can be served with a summons within this state.

The defendant may voluntarily appear, and in that event he may have his property released from the attachment by giving an undertaking, and the plaintiff may proceed to judgment, the court by the defendant's appearing, obtaining jurisdiction of the case.

But if he does not appear, he can not give the undertaking and have his property discharged, nor can the plaintiff ever have that property available to the satisfaction of his claim, because he can not proceed to judgment and execution, and the property seized under the attachment remain in the sheriff's hands without any advantage to the plaintiff.

The only advantage the attachment can be in such a case, would be to use it as a means of compelling the defendant to appear in the suit and subject himself to the jurisdiction of the court. Whether such was the intention of the Code, or whether this state of things is one of those imperfections of the Code which are so frequently lamented, is not so clear to me as to warrant me in laying it down as a general rule that an attachment may and ought to be used as such a means of coercion. There may be cases in which such a use of it may be justified. It is enough, however, for this motion, to say that this is not such a case, and inasmuch as the defendant refuses to appear in the suit, and as the attachment can be of no possible advantage to the plaintiff and is merely an instrument of taking the defendant's property out of his hands, without a possibility of its ensuring to the benefit of the plaintiff, it ought to be discharged.

Motion granted without costs.

Swarthout and others, Respondents, agt. Curtis and others, Appellants.

COURT OF APPEALS.

SWARTHOUT AND OTHERS, Respondents, agt. CURTIS AND OTHERS,
Appellants.

A decree at general term reserving no questions; and nothing to be done but to compute the amount due, was, under the former practice, a *final* decree, for the purpose of appeal. And under the Code such a decree becomes final, for the like purpose, *after* the referee's report is confirmed.

Where the rule for confirmation is entered by default, at special term the merits of that order can not come under review upon the appeal.

January Term, 1851. Bill filed in 1845 to set aside a satisfaction piece, and satisfaction of a mortgage, which had been entered of record, and to foreclose the mortgage. In September 1847, the Supreme Court, in special term, on pleadings and proofs, made a decree setting aside the satisfaction piece, and the entry of satisfaction of record; declaring the mortgage a valid security and directing a foreclosure in the usual form. It was referred to the county judge to compute and ascertain the amount due on the mortgage; and on the coming in and confirmation of his report, the premises were to be sold, and the purchaser let into possession; and the complainants were to have execution for the balance, &c. No questions were reserved. The decree was reheard and affirmed by the Supreme Court, in general term, in November 1849. The referee made his report of the amount due in March 1850, and in April following, on notice of motion for that purpose, the Supreme Court, in special term, confirmed the report of the referee by default—no one appearing to oppose. The defendants then appealed to this court from the special term decree of September 1847, the general term decree of affirmance in November 1849, and from the special term order of April 1850, confirming the report of the referee.

SAMUEL STEVENS, for the respondents, moved to dismiss the appeal, on the ground that the decree for foreclosure, &c. was not final, because an account was to be taken of the amount due on the mortgage; and in taking the account, questions of pay-

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ment might be litigated, and either party might except to the report, and thus bring the matter again before the court. He said there could be no appeal from the order of confirmation, because it was taken by default; and besides an appeal would not lie from the special term to this court. He cited *Kane vs. Whittick*, 8 *Wend.* 219.

B. W. BONNEY, for the appellant, cited 6 *Howard*, 201; 13 *Peters*, 15; 3 *Cranch*, 179; 9 *Paige*, 622, 639.

BRONSON, Ch. J.—As no question was reserved, and nothing remained to be done beyond computing the amount due on the mortgage, the decree was final within the meaning of that term under the former practice, although questions might possibly arise on the reference which would bring the cause again before the court. But we think the decree was not final, for the purposes of an appeal, under the present practice. It is the policy of the Code to allow only one appeal to this court in the same cause; which can not be brought until after the suit is at an end in the court of original jurisdiction. There may be an appeal to this court from “a judgment,” which is defined by the Code to be “the final determination of the rights of the parties in the action” (§ 11, 245). And when the appeal has been perfected, the clerk is directed to transmit to this court a certified copy of “the judgment roll,” which can not exist until after the amount of the recovery has been ascertained (§ 328; and see *Supp. Code*, § 2 *sub.* 3). But although the decree, at the time it was affirmed by the Supreme Court in general term, was not final within the meaning of the Code, so as to authorize an appeal to this court, we think it became final when the referee’s report of the amount due on the mortgage was afterwards confirmed, and that the appeal which was then taken from the decree was authorized by law.

There is undoubtedly a want of strict accuracy in calling the same decree final at one time, and not so at another; but the construction which we have given to the statute is the only one which will secure the right of review, and at the same time give effect to the manifest intention of the legislature to abolish the

Blydenburgh, Appellant, agt. Cotheal, Respondent.

former practice, which allowed several appeals in different stages of the same cause, and restrict the parties to one appeal, to be brought after final judgment.

The merits of the order confirming the report will not come under review on the appeal, because it was taken by default, and at a special term; and an appeal will only lie from an "actual determination" made "at a general term" (§ 11). Still it will be proper to have that order before us, for the purpose of showing that the decree of the Supreme Court had become final before the appeal was taken. Motion denied.

COURT OF APPEALS.

BLYDENBURGH, Appellant, agt. COTHEAL, Respondent.

An appeal brought on the same day that the judgment roll was filed, but previous thereto and before the hour for which the costs were adjusted, held good.

January Term, 1851. B. W. BONNEY, for the respondent, moved to dismiss the appeal, on the ground that it was taken too soon. The court below gave judgment on the first day of November last; but the costs were not adjusted and the judgment roll filed until the fourth day of that month. The appeal was taken on that day before the hour when the costs were adjusted and the roll filed.

J. W. BLYDENBURGH, in person, opposed the motion.

BRONSON, Ch. J.—As a general rule the court does not inquire into the fractions of a day, except for the purpose of guarding against injustice (*Small vs. McChesney*, 3 Cow. 19; *Clute vs. Clute*, 3 Denio, 263). We think that a sufficient answer to this motion. Motion denied.

Sheridan, Defendant in Error, agt. Mann, Plaintiff in Error.

SUPREME COURT.

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SHERIDAN, Defendant in Error, agt. MANN, Plaintiff in Error.

Where a judgment of the court below has been paid before writ of error brought, but not satisfied of record; on reversal thereof, the plaintiff in error can not enter a suggestion and award restitution of payment in his record of reversal without leave of the court.

It is otherwise where the judgment below is satisfied of record. There the evidence of payment comes up with the record, and restitution is a matter of course.

Monroe Special Term, Oct. 1850. This case originated in a Justice's Court, in which the defendant in error was plaintiff, and recovered judgment against the plaintiff in error for \$16.97. The plaintiff in error brought a certiorari to the late Court of Common Pleas of Monroe county, where the judgment was affirmed in 1847. The plaintiff in error then brought a writ of error to this court where the judgment of the common pleas and that of the justice was reversed at the general term thereof held in Monroe county in June 1850.

Prior to the bringing of the writ of error to this court, and prior to filing the record of affirmance in the common pleas, but after the attorney for the defendant in error had prepared such record, the plaintiff in error paid the attorney for the defendant in error the amount of the judgment before the justice with interest and the costs of affirmance in the common pleas, deducting \$1.00 for filing the record.

After the judgment of reversal in this court, the attorney for the plaintiff in error made up and filed a record of such judgment, in which he inserted an order for the restitution of the moneys paid by the plaintiff in error upon the affirmance in the common pleas, in the words and figures following, viz:

"And it appearing to the court here that said Robert J. Mann has paid to the said Michael Sheridan on said judgment so reversed, the sum of \$36.01, on the 6th day of August 1847: Therefore it is considered that the judgment of the justice and the county court aforesaid for the errors aforesaid and other errors in the record and proceedings be reversed, annulled and altogether held for

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nothing; and that said Robert J. Mann be restored to all things which he has lost by occasion of said judgment and that he recover of the said Michael Sheridan the sum of \$31·01, with interest thereon from the said 6th day of August 1847, and also that he recover one hundred thirty-nine dollars seventeen cents (\$139·17), adjudged to him before the said court by the justices thereof for his damages, costs and charges which he has expended in the prosecution of his writ of error, which sums, in the whole, amount to \$169·18; and that said Robert J. Mann have execution therefor." The judgment for restitution was entered without an order of any court or judge, and without the consent of the defendant in error. On the 24th day of June last an execution was issued to the sheriff of Monroe county. The sum of \$139·17, costs of the writ of error, was taxed *ex parte*, and upon retaxation upon notice, after the execution was issued, the sum of \$34·73 was disallowed and deducted therefrom, and the sum of 93 cents added to the amount of interest on the \$31·01, originally inserted in the bill, and the same was finally taxed at \$105·37.

Immediately after the retaxation of the costs, the attorney for the plaintiff in error served upon the sheriff of Monroe county a notice to deduct the sum of \$34·73 from the amount to be collected on the execution as of the day judgment was rendered. There are other facts stated in the affidavits read on the motion, some of which are adverted to in the opinion which follows.

A motion is now made that the judgment record and all subsequent proceedings be set aside, unless the plaintiff in error deduct from the execution \$37·24, besides the sum of \$34·73, disallowed on retaxation.

E. IDE, for Defendant in Error.

T. FROTHINGHAM, for Plaintiff in Error.

WELLES, Justice.—The plaintiff in error was irregular in awarding restitution for the particular sum alleged by him to have been paid in satisfaction of the judgment in the common pleas. The rule is that where the record of the inferior court, which is brought up by the writ of error, shows the judgment satisfied, restitution is a matter of course, and may be had by

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the plaintiff in error after reversal, without motion to the court or *scire facias*. The reason given is that in such case it appears on the record that the money is paid, and there is a certainty of what is lost (*Tidd's Prac.*, 936-7). But where the record does not show the fact of payment or satisfaction of the judgment in the court below, as is the case here, the plaintiff has no right, upon his bare suggestion of the payment, to enter an award of restitution upon the record of reversal of the particular sum paid. The fact of payment in such case, is a matter resting *in pais*, and the defendant in error has a right to be heard before being compelled to pay. True, the judgment upon reversal is that the plaintiff in error be restored to all that he has lost. But what has he lost beyond the costs of prosecuting the writ of error? The court can not know except by the record. If that does not show the payment, by the more ancient practice the party was put to his *scire feci* inquiry to ascertain the fact, upon the return of which, restitution was awarded or refused. But it is understood the modern practice has been to apply to the court by motion, on affidavit and notice to the opposite party for leave to suggest the fact on the record, upon which judgment of restitution is awarded. On such motion, if it was clear upon the affidavits that the plaintiff was entitled to restitution, it would be awarded. If serious doubt existed, the defendant in error would be allowed to traverse the suggestion.

The question of the right of the plaintiff in error in this case to have restitution, has been fully litigated on this motion. It is shown that the judgment in the common pleas was paid by him before the writ of error was brought to this court. It is contended on the part of the defendant in error, and attempted to be shown, that the payment was voluntary, and made under an agreement amounting to a compromise and settlement of the matters in dispute between the parties. If this were in fact the case, how does it happen that the writ of error was brought and that no motion has been made to quash it on that ground? The fact that the parties have been before the court upon the question whether there was or was not error in the judgment below, shows either that there was no such agreement, or if there was, that it has been

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abandoned. I think the defendant in error fails to show in his moving papers any binding agreement of the character and effect as claimed. It is clearly shown that the whole judgment below was paid before the writ of error was brought, and receipts given by the attorney for the defendant in error, copies of which are set forth in the opposing affidavit. The money was paid in two sums; the first was \$20, and a receipt given stating that it was to apply on the judgment, and the second was \$16.01, the receipt for which states it to be in full of the balance of damages and costs in the suit. The deduction of one dollar by the attorney for the defendant in error, was for an item of disbursements which was not then, and has never since been incurred by him. I think it was competent for the plaintiff in error to pay the judgment against him before execution and afterwards to bring error, and if he succeeded on the writ of error he would be entitled to restitution. It was not necessary for him to wait until an execution was issued before payment, in order to entitle himself to restitution in case he should get the judgment reversed.

The case presented, therefore, is of a party doing what he had no right to do without leave of the court, but what the court would have allowed him to do upon asking leave, on motion and notice to his adversary; and the question is whether what has been thus done, shall be allowed to stand, and upon what terms.

There is no use of another motion in relation to this matter; as before remarked, the merits of the question of the right to restitution have been fully gone into and litigated on this motion, and I am satisfied that the plaintiff in error is entitled to restitution. His practice was irregular and disorderly, and should not be countenanced.

Upon the whole, I am disposed to allow the record to stand, upon the plaintiff in error deducting from the execution in the sheriff's hands \$33.80, being the amount disallowed on retaxation of the costs after deducting therefrom the sum of 93 cents added on such retaxation; and upon the plaintiff in error paying the defendant in error, or his attorney, ten dollars as the costs of this motion, and in default thereof that the motion be granted with \$10 costs.

SUPREME COURT.

GRIFFING agt. SLATE AND GARDINER.

A report of a referee made upon the question of damages consequent upon the dissolving of an injunction, must be *confirmed* (on motion at special term) before the court can entertain an application to prosecute the undertaking given upon the issuing of the injunction.

In all cases where a report is required for the purpose of enabling the court to make some discretionary order or decree thereon, it requires confirmation.

New York Special Term, July 1850. The defendants had obtained a reference to ascertain the damages which they had sustained by reason of an injunction which had been dissolved. Upon the referee's report they now moved for leave to prosecute the undertaking which had been given on suing out the injunction.

For the plaintiff it was objected that the report had never been confirmed, no order of course to confirm it had been entered, nor any motion to that effect made, and that there were objections to the report which the plaintiff desired to present to the court.

EDMONDS, Justice.—A report of a referee does not require confirmation where it is not intended to be made the foundation of any future discretionary act of the court. This rule has some exceptions which it is unnecessary to mention here, because in no respect affecting this case.

But where a report is required for the purpose of enabling the court to make some discretionary order or some decree thereon, whether the order directing the reference be made upon decree or upon an interlocutory application, the report requires confirmation before it is adopted as the foundation of such future order or decree.

The report in this case is one which requires confirmation, for upon it the court is to pronounce its judgment as to the damages which the defendants have sustained by reason of the injunction and is to determine whether the injunction bond shall be ordered to be prosecuted (2 *Dani Pr.* 1486; *Otley vs. Pensam*, 1 *Hare*,

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324; *Empringham vs. Short*, 11 *Sim.* 78; 1 *Barb. Ch. Pr.* 550). The mode of obtaining confirmation is not the same in all cases.

If the reference be made on the hearing or upon further directions, there the practice is upon filing the report to enter an order of course, to confirm the report, unless cause to the contrary be shown in eight days after service of notice of that order.

But where the report is the consequence of orders made on motion or petition, the confirmation can only be by special motion, or on petition.

The report in this case is one of the latter kind, and can be confirmed only on special motion. That not having been done in this case, the plaintiff can not have his motion to prosecute the bond. He must first get his report confirmed on a special motion for that purpose. Motion denied with costs.

SUPREME COURT.

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Where an answer and demurrer on one paper—the demurrer immediately following the answer—were served, and a reply served to the answer and the demurrer noticed for argument, but before the expiration of the twenty days from the service of the reply an amended answer was served, being an exact copy of the original, except the demurrer, which was left off—*held*, that the plaintiff was not bound to reply to the amended answer. The reply already served was sufficient—the answer in fact was not amended.

Erie Special Term, Dec. 1850. An answer was put in to the complaint in this cause, containing special matter which, if true, constituted a defence to all the causes of action contained in the complaint.

On the same paper, and following the matters of fact contained in the answer, was a demurrer to the whole complaint. The plaintiff replied, denying the matters of fact set up in the answer, and also (as it is now stated by counsel) noticed the demurrer for argument. Within twenty days after the reply was served, the

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defendant's attorney served what he called an amended answer. This paper was an exact copy of the former answer, but left out that part which was treated as a demurrer. The plaintiff did not reply anew, and the defendant claiming that the facts stated in the answer now stand admitted, moves for judgment on the pleadings.

JOHN GANSON, *for Defendants.*

CH. H. S. WILLIAMS, *for Plaintiff.*

SILL, Justice.—Section 172 of the Code which provides for the amendment of pleadings, of course, directs that such amendments shall be made without prejudice to the proceedings already had in the action. It has been suggested that this provision which is not found in the former rules of the court regulating amendments, was intended to change the former practice, so far as it required amended pleadings to be answered anew, in cases where they had been appropriately answered before amendment (1 *Hill*, 214; 5 *Id.*, 556: 1 *Wend.* 16). It is not, however, necessary, at present to decide this question. The answer in this case has not been amended at all. The answer and demurrer are different pleadings (§149, 156 of the Code), and by the fact that they were on one paper, and in form connected, they do not lose their distinct character. An answer and demurrer to the same cause of action is irregular in practice, and the defendant might have been compelled to elect by which they would stand, although it seems in this case the plaintiff was willing they should have the benefit of both.

The service of the paper called an amended answer, seems to have been a resort of the defendant's attorney to get rid of his own demurrer. Whether he succeeded in this, it is not now my purpose to inquire, but it certainly did not affect the question of fact joined in the case; it amounted to nothing (so far as this question is concerned) more than the service of a second copy of the original answer. This certainly did not make it necessary for the plaintiff to serve his reply over again, and as the whole matter of the answer stands denied, the motion can not prevail.

It is denied with costs.

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SUPREME COURT.

PEEBLES agt. ROGERS.

Where service of papers is made by mail, by depositing in a post office other than that where the attorney making the service resides, the attorney upon whom they are served can not take advantage of such service if the papers are received in time. The attorney making the service in such case takes the risk of their being received in time.

A County Judge has power, independent of the Code, to grant an order extending the time to answer.

There is nothing in any part of the Code which takes away any of the powers given to county judges by the 29th section of the judiciary act of 1847, except that part of section 401 which enacts that "*motions must be made within the district in which the action is triable, or in a county adjoining that in which it is triable, except &c.*" And this clause must be understood as applying exclusively to motions made upon notice.

The reasonable construction to be given to the phrase in § 401, "*the county where the action is triable,*" includes any county in which according to sections 123, 124 and 125, the plaintiff is at liberty to have the action tried.

Montgomery Circuit and Special Term, November, 1850.

This action was commenced to recover from the defendant the amount due on two promissory notes, and also to recover damages on a written contract in relation to a farm let by the plaintiff to the defendant. The summons without the complaint was served on the 17th day of September last.

On the second day of October, and five days before the time of answering expired, the defendant's attorney wrote to the plaintiff's attorney for a copy of the complaint, and giving him notice that he was retained by the defendant to defend the action. As this request was not made within ten days after the service of the summons, as required by section 130 of the Code, the plaintiff's attorney disregarded it, and made no answer to the request.

On the fifth day of October the defendant's attorney, upon an affidavit made by him, showing that the action was commenced upon a written contract and that the plaintiff resided in the county of Otsego and the defendant in the county of Montgomery, and that the defendant had not been able to procure a copy of the said contract, applied to the judge of the county court of Montgomery and obtained an order from him extending the time in

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which to answer the complaint twenty days from the date of the order. On the same day the defendant's attorney, who resides at Port Jackson in the town of Florida, served a copy of the affidavit and order on the plaintiff's attorney, by mailing the same at Amsterdam, in the county of Montgomery, addressed to the plaintiff's attorney at Cherry Valley, by whom they were, on the 8th of October, remailed to the defendant's attorney enclosed in a letter, a part of which is as follows: "I enclose to you the copy affidavit and order, supposing that the order granted by Judge Belding does not extend the time or stay plaintiff's proceedings. I should not notice the defect in an ordinary case, but in this case, as I understand it and fully believe, the defendant is utterly irresponsible and the amount claimed is honestly and legally due to the plaintiff, the defendant having no defence, at any rate, my client should not be put to the expense of litigating with a man of whom the *costs* can not be collected."

By the same mail, the plaintiff's attorney forwarded a notice to the defendant's attorney, that the clerk would at his office in Cooperstown, on the 22d day of October at twelve o'clock M., insert in the entry of judgment the costs and disbursements allowed by law.

The defendant upon affidavit of merits, and the above facts, now moved to set aside the said judgment for irregularity, with costs, and for an order requiring the plaintiff or his attorney to deliver to or allow the defendant's attorney to take a copy of the agreement mentioned in the complaint, or for such other order as may be just in the premises.

JAMES E. DEWEY, *for Plaintiff.*

CULVER PETERSON, *for Defendant.*

CADY, Justice.—The attorney for the plaintiff objects to the service of the papers, as they were mailed at Amsterdam, although the defendant's attorney resides at Port Jackson, and he refers to the case of *Schenck vs. McKie* (4 *How. Pr. R.* 246). In that case the papers were not received until the time to answer had expired, unless the service was deemed to have been made when

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the papers were deposited in the post office. As I understand the case cited, it only shows, that papers will not be deemed to be served when deposited in a post office, unless deposited in the post office in the place where the attorney resides who makes the service. If he deposits them in another post office he takes on himself the hazard of their being received in time by his adversary. If received in time no matter where they were mailed; that the order of Judge Belding was received in time is not disputed in this case.

The attorney for the plaintiff insists that Judge Belding had no authority to grant the order, as the place for trial designated in the complaint, was the county of Otsego and he resided in the county of Montgomery. The attorney for the plaintiff has referred to the case of *Eddy vs. Howlett* (2 *Code Reporter*, 76), as an authority for saying that the order granted by Judge Belding was a nullity; but as I understand that case, it does not prove that Judge Belding acted without authority.

In that case a county judge had granted an injunction by order, as a provisional remedy, and he had no authority to grant such an order except it was given to him by the Code. In that case, the injunction was granted by a county judge of the county of Kings, in an action triable in the city of New York. The case does not show whether the motion for the injunction was made upon notice or without notice; but whether it was made upon, or without notice, section 401 of the Code proved it void.

By that section it is enacted that "an application for an order is a motion," and that "motions may be made in the first judicial district to a judge or justice out of court except for a new trial on the merits," and that "motions must be within the district in which the action is triable, or in the county adjoining that in which it is triable, except that where the action is triable in the first judicial district, the motion *must* be made therein." There is nothing in this part of the section which limits it to motions made upon notice and if it includes motions whether made upon notice or without notice, the injunction was granted without authority, as the motion for it was not made in the first judicial district.

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The other part of the section is as follows: "Orders made out of court, without notice, may be made by any judge of the court, in any part of the state; and they may also be made by a county judge of the county where the action is *triable*, except to stay proceedings after verdict."

If the motion for an injunction in the case of *Eddy vs. Howlett* was made without notice, then the county judge of the county of Kings had no authority to hear the motion or grant the order, as the action was triable in the city of New York, and he had no authority but by the Code. That case was no doubt correctly decided, but it did not necessarily call for the construction of the 29th section of the judiciary act or any part of the Code except section 401.

I do not regard that case as an authority for saying that the order made by Judge Belding was void. No county judge has power to grant an injunction as a provisional remedy except by the Code, but a county judge has power, independent of the Code, to grant an order extending the time in which to answer.

By 2 R. S., 279, section 18, Supreme Court Commissioners were required to perform all the duties and to execute every act, power and trust which a justice of the Supreme Court might perform out of court in all civil cases, except as therein otherwise provided; and by section 32, page 281, the same power is given to the judges of the county courts, being of the degree of counsellor in the Supreme Court.

By the 8th section of the 14th article of the Constitution of 1846, the office of Supreme Court Commissioner was abolished, and that may have been understood as taking from county judges all power to do anything in relation to motions in the Supreme Court; but by the 29th section of "an act in relation to the judiciary," passed 12th May 1847, it is enacted that "county judges, in their respective counties shall have power to perform all the duties and do all the acts now required to be done and performed by the judges of the county courts when not holding county courts, or any one or more of them, at chambers or otherwise, so far as those acts and duties are consistent with the

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constitution and the provisions of this act." At the time this enactment was made, judges of county courts, if of the degree of counsellor in the Supreme Court were required to perform all the duties and to execute every act, power and trust which a justice of the Supreme Court might perform out of court; and they must now have all the powers granted by the act of the 12th of May 1847, unless the 29th section of that act has been repealed in whole or in part. I can discover no act which in terms repeals that section in whole or in part.

What is the effect of the words "in their respective counties" in that section? Do those import any thing more than would have been implied without them, that the judges of the county courts can not perform official duties out of their respective counties? They are local officers (12 *Wend.* 139, *Jackson vs. Lake*).

Although a county judge must perform his official duties within his county, yet his acts when done, may have effect in any and all parts of the state. Before the code took effect, a county judge might have signed a judgment record in the Supreme Court, no matter where the venue in the action was laid, or where the record was to be filed. He could perform that duty only in his own county, but the record when filed and the judgment when docketed would be a lien on the lands of the debtor in every county in the state to which a transcript of the judgment should be sent. Such judges could take the acknowledgment of bail in actions in the Supreme Court, and the acknowledgment of the satisfaction of judgments in the Supreme Court.

The 24th section of the judiciary act required that a general term of the Supreme Court organized by that act, should be held at the Capitol in the city of Albany, amongst other things "to establish, revise and alter the rules of the said court;" and in obedience to that law a term of the Supreme Court was held, and the rules established, revised and altered; and by the 89th, 90th and 91st rules then adopted, the fact that there were officers other than the justices of the Supreme Court who had authority to grant orders in actions pending in the Supreme Court, was fully recognized. The office of Supreme Court Commissioner was

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abolished, but there were then county judges, and the 29th section of the judiciary act was then in full force, and they were the officers to whom the above rules in fact referred.

How far has the Code repealed or modified the said 29th section? There is no allusion in the Code to that section, yet if there be any enactments in the Code in direct conflict with it, those enactments being the last expression of the legislative will, must be regarded as the law. By one part of section 401 of the Code, orders out of court, and without notice, "may also be made by county judges of the county where the action is triable, except to stay proceedings after verdict." This clause confers no new power upon county judges, and as it is in the affirmative it takes from them no power which they before had.

By section 403 it is enacted that "in an action in the Supreme Court a county judge, in addition to the powers conferred upon him by this act, may exercise, within his county, the powers of a judge of the Supreme Court at chambers, according to the existing practice, except as otherwise provided for in this act." In this the legislature of 1849, recognized the fact that a county judge then had, in actions pending in the Supreme Court, the power of a judge of that court at chambers, "except as otherwise provided for in that act." There is nothing in this section, or in any part of the Code which takes away any of the powers given to county judges by the 29th section of the judiciary act, except that part of section 401, which enacts that "*motions must* be made within the district in which the action is triable, or in a county adjoining that in which it is triable, except, &c." If this clause applies to all motions made in court or out of court, upon notice or without notice, then no county judge can hear a motion and grant an order in an action in the Supreme Court, unless it be triable in his county, or in an adjoining county; and even then Judge Belding had authority to make the order, as he resides in a county adjoining that designated as the place of trial.

The clause above referred to, must be understood as applying exclusively to motions made upon notice, otherwise it can not be reconciled with the next clause in the section. And the only

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limitation which I can discover to the powers of a county judge to grant an order enlarging the time to answer, is in 2 R. S. 281, sections 29 and 32; he is in no case to grant an order on the application of an attorney or party residing more than forty miles from the residence of such judge, if there be an officer authorized to grant such order residing within forty miles of the applicant therefor. The Code ought to have such an interpretation as will most effectually promote the convenience of the parties litigating.

There are many counties in the state in which no justice of the Supreme Court resides, and the justices of that court in the country are much of their time from home; and out of the large cities there are no officers, other than the county judges, who are authorized to do business which justices of the Supreme Court may do out of court; and the convenience of parties in the country demands, that acts giving powers to county judges to do chamber business should be liberally construed.

In what sense did the legislature in section 401 of the Code, use the word *triable* in the phrase "*in which the action is triable?*" In its popular sense, it means any place in which the action may be tried. An action in the Supreme Court may by an order of the court be tried in any county in the state; the legislature did not use the word *triable* in section 401 in that sense; for its use in that sense would, in that section, create no limitation.

But may it not reasonably be said the words in section 401, "the county where the action is triable," includes any county in which, according to sections 123, 124 and 125, the plaintiff is at liberty to have the action tried?

By section 123, certain actions *must* be tried in the county in which the subject of the action or some part of it is situated, subject to the power of the court to change the place of trial. For example, a farm is part in one county and part in another; an action is to be brought to recover it—where will the action be *triable*? In either of the two counties—the plaintiff has his election in which county to try the cause. Suppose he lives in one of the counties and the defendant in the other; can any possible reason be assigned why the judge in one of the counties

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should have, and the judge in the other should not have power to grant an order enlarging the time to answer or reply in the cause?

By section 124 certain actions are specified which *must* be tried in the county where the cause or some part of it arose.

And by section 125, in all other actions, the action shall be tried in the county in which the parties or any of them shall reside at the commencement of the action; or if none of the parties reside in the state, the same may be tried in any county which the plaintiff may designate in his complaint.

In this case, the action is upon contracts, the residence of the parties controls as to the place of trial; the plaintiff resides in Otsego and the defendant in Montgomery; the action was triable in either county at the election of the plaintiff.

If the judgment in this case be set aside, the plaintiff can by amending his complaint change the place of trial from Otsego to Montgomery; if that be done would it take from the county judge of Otsego the power he now has to make an order in the cause? And can a reason be suggested, why the county judge in Montgomery should not have power to enlarge the time in which the defendant may answer, as well as the county judge in Otsego should have power to enlarge the time in which the plaintiff may reply? So take the case where neither party resides in the state, the plaintiff may, if the action be founded on contract, select any county as the place of trial and in such case, where would be the injustice to permit the defendant to apply to the county judge nearest to him for an order to enlarge the time in which to answer? I can discover none, nor can I believe that there is any law rendering the order made by Judge Belding in this case void; and therefore I am of opinion that the judgment in this cause be set aside and that the defendant have twenty days in which to answer the complaint, and that the costs of this motion abide the event of the suit.

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SUPREME COURT.

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SAGE & Co. and ELY.

All those preexisting rules of pleading, at common law or in equity, which are not expressly abrogated, and which can properly be made applicable under the new system (the Code), remain in force.

Therefore, the statement of facts in a complaint, should be in conformity with the nature of the action. If the case and the relief sought be of an equitable nature, the rules of chancery pleading are to be applied—otherwise those of the common law.

Monroe Special Term, January, 1851. The plaintiffs, the Rochester City Bank and Ralph Lester, a banker in Rochester, in the summer of 1850, severally discounted bills drawn upon, and subsequently accepted by the defendants, Suydam, Sage & Co. and endorsed by the defendant Ely, to the amount in the aggregate of \$68,440.

Suydam, Sage and Co., the acceptors, having failed before the maturity of the bills, they were all protested and returned to the plaintiffs unpaid. At the time of the discounting of the bills, Ely had in his hands and under his control, a large amount of property belonging to the acceptors, consisting of real estate, securities, &c. upon all of which he claimed a lien by special agreement as an indemnity against his endorsements.

This property is now claimed by the defendant Ferdinand Suydam, partly by virtue of an assignment from Suydam, Sage & Co. after their failure, and partly as original proprietor.

The suit was brought to reach the securities in Ely's hands, and to be subrogated to his rights in respect to them, and the plaintiffs aver that they discounted the bills upon the faith and credit of these securities, and of Ely's lien thereon.

The complaint not only avers the existence of the lien, but also contains a description of the various items of property upon which it is claimed to rest, and sets out with much minuteness of detail, the transactions between Ely and the firm of Suydam, Sage & Co., including extracts from their correspondence, for the purpose

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among other things, of showing that the lien extended to the property described in the complaint.

The defendants Ferdinand Suydam, and Suydam, Sage & Co. move to strike out a large portion of the complaint, upon the ground that the plaintiffs should have confined themselves to a statement of those general facts which are essential to their claim to relief, and had no right to insert in their complaint, any portion of the evidence upon which they relied to establish such essential facts, nor any of the minor details of the case; in other words, upon the ground that the common law rule of pleading, which required the party at all times to state facts, and not the evidence of facts, is applicable under the Code, as well to actions of an equitable nature, as to those which prior to the Code were exclusively of common law cognizance.

A. WORDEN, and S. MATHEWS, *for Plaintiff*.

J. A. VERPLANCK, G. R. J. BOWDOIN, J. L. TALCOTT, *for Defts*.

SELDEN, Justice.—This motion involves to a great extent, the effect of our recent changes in the system of pleading in civil actions.

The magnitude of those changes, and the diversity of opinion that prevails in regard to them, can not fail to produce a sense of weighty responsibility, in those who are called upon to act judicially upon the subject, and I regret that the duty of passing upon this question has not devolved upon others.

It is obvious that the rule contended for by the defendants here, would if adopted, introduce the most sweeping changes into the forms and mode of pleading in all that class of actions heretofore denominated equitable. Prior to the Code, this was purely a common law rule, and had no application whatever to pleadings in the Court of Chancery. Evidence consists of facts; and to state matters of evidence is of course to state facts. A rule, therefore, requiring facts to be pleaded, instead of the evidence of facts, is utterly unmeaning unless a limited signification is given to the term facts. The true interpretation of the rule was this: That in a common law pleading, no averment of any fact

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should be made, which was not so indispensable that to strike it out would destroy the cause of action or defence; and that in making such averments the main facts should be directly stated, and not by way of inference from other facts. It is only in this connection that the rule in question can have any meaning.

But did the system of chancery pleading contain any such rule? was nothing to be inserted in a bill in equity, with a view to obtaining, through the admissions of the other party, evidence to support the case, nor any facts or circumstances, for the purpose of strengthening and giving color and body to the equity claimed? Every one who ever entered the doors of a Court of Chancery knows the contrary.

But it is said that the legislature by abolishing the distinction between the different forms of action, have manifested an intention to mould the two systems of pleading into one, and to have hereafter but one set of rules for all actions.

Undoubtedly it was the intention of the legislature, to simplify and render less complex the modes of judicial proceeding. But this simplicity in regard to actions has been attained at a considerable sacrifice. Classification, arrangement, is a vital principle in every science; and especially in that of the law, which consists of such a multitude of abstract rules, is it indispensable to its clear comprehension and just application. That important branch of the common law which relates to civil remedies, has from the origin of the science been arranged under heads corresponding with the divisions of actions. Under this arrangement, books have been written, indexes and digests compiled, and the legal knowledge of every lawyer is stored in his memory in the same order. He can not search for a principle either in his books, or in his own mind, without having this division in view.

If this arrangement were to be effectually broken up, it requires but little knowledge of science or philosophy to appreciate the consequences. What was order would for a time at least, have become confusion; and the work of reconstruction and rearrangement, would have to be immediately commenced. But happily we have no consequences quite so serious to apprehend.

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The common law division of actions with all its evils, was founded in one respect in the most just principles of science. It followed the real distinction in actions, and the names adopted were in general descriptive of the nature of the action. The same differences still exist. The legislature was too wise to attempt to abolish them, or to enact that an action to recover possession of real estate, should be held to be the same thing as an action upon a promissory note, or an action upon a bond as one for an assault and battery. It has been guilty of no such absurdity; but has simply provided that they shall all be called by the general name of civil actions, leaving the specific differences between them to be defined by appropriate phraseology.

It may be thought that these remarks are foreign to the question to be decided; but my object is to show, that as the legislature in giving a statutory name to all actions, has left untouched those natural distinctions which exist between them, nothing is to be inferred from this particular enactment in respect to the modes of pleading designed to be adopted; but that all those preexisting rules which are not expressly abrogated, and which can properly be made applicable under the new system remain in force.

It is clear also, that the section of the Code which requires every complaint to state the *facts* constituting the cause of action, is not at all decisive of this question. Whether a complaint is drawn in the condensed form required by the rules of the common law, or with all the elaborate detail which the practice of the Courts of Chancery warranted, it equally states facts, and equally complies with the provisions of this section.

There is but one way of properly determining the point we are considering, and that is to look into the reasons which led to the adoption of different modes of stating facts in the courts of equity and common law, and to see whether the constitutional blending of the two jurisdictions in one court, and the various statutory provisions bearing upon the subject have removed these reasons; for if they have, then the principles of science and of law, which are opposed to keeping up a distinction where no

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reason for a difference exists, would require that the same rules should be applied to all actions.

It is not difficult to trace the causes which led to the adoption of those strict and logical rules constituting the common law system of pleading, which compelled the parties to eliminate from the issue to be tried every thing not strictly essential to the ultimate right.

They were, first, the reference of questions of law and of fact to different tribunals; and secondly, the almost absolute necessity of having those issues which were to be presented to a jury, single and decisive of the right.

Trial by jury therefore, lies at the foundation of the reasons upon which the common law system of pleading was constructed, and while that is preserved those reasons must ever continue with unabated force.

To the same cause are we indebted for the precision and certainty of the common law itself. The court could only look at the record in pronouncing its judgment; no minor circumstances were admitted to modify the rule. Hence trial by jury, and the system of pleading which was its natural consequence, annihilated the discretion of the judge, and with it his power to pervert justice. But it had other consequences. Cases would sometimes occur, in which the injustice arising from the application of the inflexible rules of the common law, was so manifest, that the universal sense of equity and right, demanded that a power should exist somewhere of relaxing those rules. This led by a gradual process to the establishment of the Court of Chancery.

The trial of questions of fact by a jury, therefore, gave rise to this court, with the jurisdiction conferred upon or assumed by it. Without this cause the Court of Chancery, as a separate court, would never have existed.

As therefore the common law system of pleading, with its causes and consequences, created the necessity for the Court of Chancery, we should naturally expect the adoption of a different system in that court.

It seems however to have been supposed, not only by the

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counsel who argued this motion for the defendants, but by some eminent writers on the subject, that the only reason for a more minute and detailed statement of facts in a bill in chancery than in a declaration at law, was to obtain a discovery from the defendant. These authors say, that such a bill partook of two natures, first that of a pleading, and secondly, that of a written examination of the defendant; and they seem to have inferred that as a pleading merely, it would be subject to the same rules as at common law.

Hence it is argued, that inasmuch as it is provided by the Code, that the opposite party may in all cases be examined as a witness, there is now no reason for continuing this double and complex species of pleading in an equity case; and I confess that if the difference in the two modes of pleading rested upon no other reason than that referred to, the argument would seem to me almost irresistible.

But the glance we have given at the origin of the court, goes to prove that there are other reasons.

It would be easy to show from the history of the court, that a discovery was not the object for which its earliest jurisdiction was assumed. This application of its powers, followed the introduction of civil law pleadings, which embraced in addition to the libel or statement of the plaintiff's case, an examination of the defendant upon written interrogatories, not so much as it would seem for the purpose of searching the conscience of the defendant, as of saving the expense and trouble of taking the depositions of witnesses to facts about which there was no dispute.

An argument of much force might be drawn from the convenience of this process, in cases where the facts and the law are both to be passed upon by this court. But without dwelling upon any minor reasons, I will come at once to one which if our previous reasoning is correct must be seen to be conclusive.

The kind of relief afforded by a court of equity, imperatively required a different mode of stating the case from that adopted in the common law courts.

The decree in chancery with all its varied provisions, its con-

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ditions, and limitations, could not be engrafted upon the record of a common law action. The two were incompatible. From the one, was carefully excluded every fact not essential to enable the court to determine *for which party* to give judgment. The other required a consideration of all the circumstances bearing upon the nature of the judgment, and going to *modify* or *vary* its provisions.

But why, it may be asked, should not these circumstances be left to the proofs as at common law? For one reason, if no other, the facts stated in the bill or complaint might be admitted by the answer. There being then no issue, no proofs could be taken. The court might be able to see that the plaintiff was entitled to some relief, without having the means of determining precisely what it should be. At common law a writ of inquiry would issue, and the damages be assessed by a jury; but in the chancery system, no resource was provided for such a case.

There is, however another reason. If the plaintiff was allowed to vary his case by his proofs, his relief might be grounded in whole or in part upon facts of which the defendant had had no previous notice. The maxim that the relief must be according to the allegations, as well as the proofs, was founded in the plainest principles of justice. The books are full of cases which hold that every material circumstance going to modify the decree must be stated in the bill.

It is apparent, therefore, that the civil and the common law systems of pleading, were adapted each to its own peculiar modes of trial and relief; and that a blow at either, is a blow at the system of jurisprudence of which it is a part.

So long as jurisdiction in equity and at law are kept distinct, and courts of justice are permitted to adapt the relief they afford, to the facts and circumstances in one class of cases, while they are confined to a simple judgment for or against the plaintiff in all others, so long must different rules be applied to pleadings at law and in equity.

To do this, is not inconsistent with the provisions of the Code which does not attempt to abolish the distinction between law

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and equity, even if the legislature had the power to do so under the constitution. (*See Const. Art. 6, § 3 and 5.*)

My conclusion therefore is, that the statement of facts in a complaint, should be in conformity with the nature of the action. If the case and the relief sought be of an equitable nature, then the rules of chancery pleading are to be applied; otherwise those of the common law.

In the present case, the facts are stated with much circumstantial detail, but I am unable to say that they should be stricken out as irrelevant, or redundant, under the established rules heretofore applied to equity pleadings, and I am of the opinion that they ought not to be stricken out as embracing matters of evidence merely, for the reason that the convenience of a court of equity is promoted by having as many of the circumstances appear in the pleadings, and as few in the proofs as possible, and for the other reasons already given.

The motion must be denied, but without costs for opposing, which I am not in the habit of allowing upon motions involving unsettled questions of practice under the Code.

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Where counsel on the trial, agree as to what is admitted by the pleadings in the cause, the judge does not look into them; but he assumes an uncontradicted statement of their contents to be true.

It is too late to question the truths of such a statement for the first time on the argument of the appeal.

Each of two defendants charged with a joint offence, can not be a witness for the other.

The first clause of section 397 of the Code, "A party may be examined on behalf of his coplaintiff or a codefendant, but the examination shall not be used on behalf of the party examined," was undoubtedly intended as a substitute for the practice of examining a party against either the plaintiff or against a codefendant, as that practice was known and understood in the Court of Chancery.

November General Term, 1850. This action was brought to recover damages for the conversion of two canal boats. On the

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trial of the cause the counsel of the plaintiffs after giving evidence of the ownership of the boats and of their value, stated to the court and jury, that it was admitted by the pleadings, that Cornelius Hagerman, one of the defendants had sold the two boats at public auction before the commencement of this action; and that Aaron Hagerman, the other defendant had bid them off; that the plaintiffs were present and forbade the sale, and that they had demanded of the defendants the delivery of the boats beore this suit was commenced, and that the defendants had refused to deliver the same on such demand. This statement was not in any respect denied by the counsel for the defendants.

The plaintiffs having rested their cause, the counsel for the defendants moved that the plaintiffs be nonsuited, and at all events, that Aaron Hagerman be discharged on the ground that there was no evidence against him. This motion was denied for the reason that the facts proved and admitted, showed a *prima facie* case against the defendants.

GEO. B. JUDD, *for Appellant.*

E. S. CAPRON, *for Respondent.*

GRIDLEY, Justice.—This decision it is now urged was erroneous because upon a more careful examination it is discovered that the alleged demand and refusal was not admitted by the pleadings. This objection comes too late. The admission was assumed by the court as true, without objection or dissent, on the part of the defendants' counsel. Had the objection been made on the trial, the counsel for the plaintiffs might have adduced proof of the facts; and had an objection been made to the introduction of the proof, an amendment of the pleading might have been allowed, or if necessary, for the advancement of justice, the cause might have been permitted to go over the circuit, in order that the new allegation might be answered, on the payment of costs. When the counsel agree as to what is admitted by the pleadings, the judge does not look into them; but he assumes an uncontradicted statement of their contents to be true. It is manifestly too late to question the truths of such a statement for the first time on the

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argument of the appeal. An appeal only lies to correct some error of law committed at the circuit (*Code*, 348), and it is no error of law to receive a statement of facts, upon which both parties agree, as true. The defendants were charged in the complaint to have acted in concert, in depriving the plaintiffs of their property; and both were proved by the admission in question to have acted in concert in the disposition and withholding of the boats; Cornelius putting them up and selling them at auction, and Aaron bidding them off; and both refusing to deliver them on demand. That a joint action lies for such a cause see *Sprague vs. Kneeland* 12 *Wend. Rep.* 164.

At a subsequent stage of the trial Aaron Hagerman was called to the stand and offered as a witness, generally for his codefendant. He was objected to, on the ground that he was joined as a codefendant with Cornelius Hagerman, in whose behalf he was offered; that evidence had been given tending to show both defendants guilty, and that he was charged in the complaint with combining with his codefendant to convert the boats to their own use. The judge at the circuit refused to allow the party Aaron Hagerman to be sworn, to which ruling the defendants counsel objected; and that decision is relied on as a ground of error. This objection involves the construction of the first clause of the 397th section of the Code of Procedure. The clause reads as follows: "A party may be examined on behalf of his coplaintiff or codefendant, but the examination shall not be used on behalf of the party examined."

It is to be observed that the entire chapter of which this section is a part, is devoted to the examination of parties. The first section of this chapter (389) abolishes the "action for discovery," as it had prevailed in chancery up to that period. The next section (390) provides for the examination of a party at the instance of an *adverse* party. The succeeding sections, down to the 386th, were framed with the view of regulating the proceedings on an examination of parties. By the rules of practice in chancery there was a right not only to examine an *adverse* party but a defendant might be examined for a codefendant, at

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his instance, under certain circumstances; and unless in the new system this right should be reserved, especially in case of an equitable character, the system would be defective. Accordingly we find this practice preserved in the section now under consideration. It should not be forgotten that all distinction between actions at law and suits in equity has been abolished; and that it was the manifest intent of the framers of the Code to preserve, substantially, under the new system, the benefits derived from the practice of examining parties in chancery, and that the chapter in which the section under consideration is found, is entirely devoted to that object; and it is, in my opinion, equally clear that the clause in question was intended as a substitute for the practice of examining a party against either the plaintiff or against a codefendant as that practice was known and understood in the Court of Chancery when the code was passed. A party might be examined in chancery as to matters in which he was *not* interested, subject to all just exceptions. (see *Rule 73* of the standing rules of 1844; 2d *Paige Rep.* 54, and 1st *Barb. Ch. Rep.* 585), merely being a party to the record unless interested was no objection to a witness in that court as it was in a court of law (*Lupton vs. Lupton*, 2 *J. Ch. Rep.* 625). Still it was an invariable rule that no party could be examined except as to matters in which he was not interested (*Rule 73*). In like manner the 399th section of the Code declares that "the last section (meaning the 398th, which provided that interest in the event of the suit should not disqualify a witness) *should not apply to a party to the action.*" Again, in chancery, a defendant charged in the bill of complaint with colluding with his codefendant in regard to transactions sought to be impeached can not be a witness for his codefendant, especially when he has an interest in the cause" (*Whipple vs. Lansing*, 3 *J. Ch. Rep.* 612). It is only when a decree pro confesso has passed against a party making him liable for debt and costs, that he can be examined for his codefendant (8 *Paige R.* 460). And in *Mann vs. Cooper* (1 *Barb. Ch. Rep.* 185), it was held that a party could not stipulate his answer off the files and consent to a decree against him and thus be examined for his codefendant.

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Now this is a case where it was proved that both defendants had combined to deprive the plaintiffs of their property by a concert of action. It is true that in actions of tort, one may be convicted and another acquitted; and had Aaron Hagerman been offered to testify to a distinct matter in which he was not interested, he would have been admitted. But he was not. His evidence would have been as applicable to his own case and would have tended to defeat the action against himself equally as against his brother. Fraud is a tort; yet in chancery when a party is charged with colluding with his codefendant to defraud the complainant, he can not be sworn. But the broad language of the section (397) is relied on as indicative of an intention on the part of the Legislature to create a new rule by which defendants charged with a joint liability, whether it arise out of a tort or contract, may be respectively sworn for each other. I however, can see no reason for adopting a construction so alarming as that would be. We have the strongest reason for supposing that the legislature merely intended to adopt the rule as it prevailed in chancery, and enact it as a part of the statute law, applicable to cases arising under the Code.

In aid of this rational interpretation of a controverted provision of the Code, it is well worth while to refer to a salutary rule of construction. Whenever it is the intention of the legislature to adopt a well known principle of the common law, and to apply it to a new class of cases; or whenever it is the intention of the law makers to incorporate a former provision of the statute in the revision of the laws; a mere change in phraseology will not work a change in the construction of the provision in question (2 *Hill*, 380; 21 *Wend.* 316, 319; 2 *Caine's Cases in Error*, 150; 4 *J. Rep.* 317, 359). In several of these cases, especially in that of the 21st of Wendell, the language used in the provision of the statute, to be construed, departs more widely from the old enactment than does the language of the 397th section of the statute from the well known chancery rule.

Chief Justice Marshall says, in the *United States vs. Fisher*, (2 *Cranch*, 358), "Where rights are infringed, where fundamental

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principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects." I know of no more fundamental principle than that which forbids a man to be a witness in his own cause; or what is substantially the same thing, that each of two defendants charged with a joint offence, shall be a witness for the other, and mutually swear each other clear. We are not, however, under the necessity of invoking so bold a principle; for we think the interpretation we have given to the portion of the section under consideration is, when its connexion with the residue of the chapter is considered, and the rule as it formerly prevailed in chancery is remembered, exceedingly natural and obvious.

SUPREME COURT.

ESMAY agt. FANNING.

A bailee of a chattel is answerable in trover, on showing a delivery to a person not authorized to receive it.

Where I. E. loaned a carriage to H. F. to be by H. F. safely kept and occasionally used, and to be redelivered to I. E. on request, held that the place of redelivery was the residence of I. E. and that a delivery elsewhere without authority was a conversion. The fact that the carriage was stored by I. E. in the stable of one C. at the time H. F. first received it did not authorize H. F. to return the carriage to C., who had ceased to be the agent of I. E.

In such case the delivery of the carriage to C. instead of I. E. amounted to a conversion, and proof of a demand and refusal before suit brought was unnecessary. Had a demand, however, been necessary, the declaration of the defendant in answer to the demand would have been admissible as well on the part of the defendant as the plaintiff.

Schenectady General Term, May 1850. WILLARD, PAIGE, CADY and HAND, Justices. This was an action of trover for a carriage. The pleadings were drawn up under the Code of 1848. The complaint stated that the plaintiff, in June 1846, being pos-

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sessed of a carriage of the value of \$250, at the request of the defendant loaned and delivered the same to the defendant, to be by him safely kept for the plaintiff, and to be by the defendant redelivered to the plaintiff on request; that the defendant did not safely keep the said carriage for the plaintiff, but converted the same to his, the defendant's own use. That the defendant, although often requested so to do, has not returned the said carriage to the plaintiff, and the plaintiff claims damages, &c. &c. The complaint was dated August 12, 1848.

The answer alleges that the defendant did safely keep the carriage, and denies the conversion thereof to the defendant's use. It then sets out that the carriage was delivered by the plaintiff to the defendant with the privilege of using the same in consideration of the defendant's storing and safely keeping the same, and for a farther consideration that the plaintiff was to have the privilege of using the defendant's horses whenever he required the same; that the carriage was occasionally used by both parties, and the defendant's horses were used by the plaintiff. The defendant denies that he has failed to redeliver the carriage to the plaintiff, but on the contrary states that he has redelivered it to the plaintiff or his agent, in as good order as it was when received by the defendant, &c.

The reply denies that the defendant safely kept the carriage for the plaintiff while it was in the defendant's possession. The reply denies that the storage formed any part of the consideration for the loan of the carriage; alleges that the defendant promised to keep it safely; denies that plaintiff was to use defendant's horses as a consideration for such loan of the carriage, or that the carriage was used in common by the parties, while it was in the defendant's possession. The reply further alleges that the loan of the carriage was made at the defendant's request, and for his sole use, and without reward or hire. It denies that the defendant has redelivered the carriage to the plaintiff or to his agent.

The cause was referred to a referee, who reported that he found as facts, that about the 1st of June 1846, the plaintiff loaned to the defendant the carriage in question to be safely kept by the

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defendant for the plaintiff, and to be redelivered to the plaintiff on request; that the defendant had been requested to redeliver the same to the plaintiff; that the defendant and plaintiff might each use the carriage and the defendant's horses when he chose; that said carriage was obtained by defendant from the livery stable of George L. Crocker, then of Albany city, and that he kept it safely till about the 1st November 1846, during which time it was used occasionally by both parties, plaintiff and defendant. That about the 1st November 1846, it was returned by the defendant to the stable of said Crocker, *which return of the carriage to the stable of Crocker, the referee decided was not a redelivery of the carriage to the plaintiff or his agent.* He therefore reported in favor of the plaintiff for the value of the carriage at that time, on which judgment was thereupon given as for a conversion of the carriage.

The defendant appealed from the decision of the referee. A case, containing the whole testimony and various points ruled by the referee, was returned on the appeal as parcel of the record.

From the case it appears that Crocker testified that he was not the agent of the plaintiff to receive back the carriage at any time; that the defendant returned the carriage to his the witness's stable, and the witness, of his own accord notified the plaintiff that the carriage was left by the defendant at his stable; the plaintiff refused to have any thing to do with it.

It appears also that the referee decided that a demand and refusal were admitted by the pleadings, to which the defendant's counsel excepted.

The plaintiff called one Nichols as a witness, who testified that in the summer of 1848, and before the commencement of this action, he, at the request of the plaintiff, called on the defendant and told him to return the said carriage to the plaintiff. On his cross examination the defendant's counsel proposed to ask the witness to relate the answer which the defendant gave to that reply. This was objected to by the plaintiff's counsel, and excluded by the court, and the defendant's counsel excepted. The defendant's counsel then offered to prove that the defendant said

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that the carriage had been *returned to the plaintiff pursuant to the agreement between them*. This also was objected to and excluded, to which the plaintiff's counsel again excepted. Other facts are alluded to in the opinion of the court.

The defendant's counsel insisted that the judgment should be reversed.

F. S. EDWARDS, *for Defendant*.

H. C. VAN VORST, *for Plaintiff*.

By the Court, WILLARD, J.—The gist of this action is the conversion and deprivation of the plaintiff's property, and not the acquisition of property by the defendant (3 *Barn. & Ald.* 685).

The general requisites to maintain the action are property in the plaintiff's actual possession, or a right to the immediate possession thereof and a wrongful conversion by the defendant (4 *Barb. S. C. Rep.* 565). The plaintiff's title was not disputed in this case. The issue is on the conversion; or, in other words, it is whether the defendant redelivered the carriage to the plaintiff or his agent before the commencement of this suit. The plaintiff alleges a refusal to redeliver it, and the defendant avers that he did redeliver it. The referee found the fact that the defendant did not redeliver the carriage to the plaintiff or his agent; and the proof is that Crocker, to whom the defendant did deliver the carriage in November 1846, was not at that time the agent of the plaintiff or authorized to receive it, and there is no evidence that the plaintiff ever assented to that delivery. The question therefore becomes narrowed down to this; whether a bailee of a chattel is answerable in trover on showing a delivery to a person not authorized to receive it. In *Devereux vs. Barclay* (2 *B. & Ald.* 702), it was held that trover will lie for the misdelivery of goods by a warehouseman, although such misdelivery was occasioned by mistake only, and this court in *Packard vs. Getman* (5 *Wend.* 613), held that the same action would lie against a common carrier who had delivered the goods by mistake to the wrong person. The same point was ruled by Lord Kenyon in *Youl vs. Harbottle* (*Peake N. P. Cases*, 49,) and by

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the English Common Pleas in *Stephenson vs. Hart* (4 *Bingham*, 476). If trover will lie against a common carrier or a warehouseman for a misdelivery, it can, under the like circumstances, be sustained against a bailee for hire or a gratuitous bailee. It results from the very obligation of his contract that if he fails to restore the article to the rightful owner, but delivers it to another person not entitled to receive it, he is guilty of a conversion (*Story on Bailment*, § 414).

The referee found as a fact that the carriage was not redelivered to the plaintiff, but was delivered to another person having no right to receive it. The evidence detailed in the case warranted that finding and it can not be disturbed by this court. We think the referee drew the right conclusion from that fact and justly held the defendant liable for the value of the carriage.

As the parties all lived in the same city the carriage should have been returned to the plaintiff, unless there was some agreement to the contrary. The fact that the carriage was stored by the plaintiff in Crocker's stable at the time the defendant first received it, did not authorize him under a contract to return it to the plaintiff, to deliver it to Crocker, who had ceased to be the plaintiff's agent.

The place of delivery of the carriage was the plaintiff's residence (*Barnes vs. Graham*, 4 *Cowen*, 452; *Story on Bailment*, § 257, 261, 265). A delivery elsewhere, without authority, was a conversion; we have not adopted the civil law, which allowed the bailee, in case no place was agreed on, to restore the property to the place from which he took it (*Story on Bailment*, § 117).

It was not necessary, in this case, to prove a demand and refusal. Had the carriage remained in the defendant's possession, no action could have been maintained by the plaintiff against the defendant until it had been demanded and the defendant had neglected or refused to return it. A demand and refusal are not a conversion, but evidence from which it can be inferred. A demand is necessary whenever the goods have come lawfully into the defendant's possession, unless the plaintiff can prove some wrongful act of the defendant in respect of the goods which

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amounts to an actual conversion (2 *L. N. P.* 1483; *Bates vs. Conklin*, 10 *Wend.* 389; *Tompkins vs. Haile*, 3 *Wend.* 406). As the delivery of the carriage by the defendant to Crocker instead of the plaintiff amounted to a conversion; proof of a demand and refusal was unnecessary. The testimony of Nichols, therefore to prove a demand was immaterial and the decision of the referee refusing to permit the defendant to prove what he said at the time the demand was made could have no influence on the result of the cause. Had a demand been necessary the declaration of the defendant in answer to the demand would have been admissible as well on the part of the defendant as the plaintiff. The decision of the referee that a demand and refusal were admitted by the pleadings, whether right or wrong, worked no injury to the defendant.

A wide range was taken on the argument on the *implied* obligations resulting from the various kinds of bailment, and particularly with reference to the restoring the thing bailed to the bailor. But it seems unnecessary to discuss this subject in this case because here there was an *express* agreement to return the property to the plaintiff on request. The judgment must be affirmed.

5 How. 239—FOLLOWED, 9 How. 91, 265.
See 5 How. 238, 241.

SUPREME COURT.

DIX agt. PALMER AND SCHOOLCRAFT.

A summons issued without mentioning the court from which it emanates, is defective. (*The form prepared by the Commissioners on Practice and appended to their Report of the Code of 1848, is bad in that particular.*)

A general notice of appearance given by the defendant, however, waives the irregularity. It is an admission that he has been regularly brought into court. Where the defendant has appeared, but not answered, in an action for the recovery of money only, and the complaint is duly verified, he is not entitled to notice of assessment. In such case there is no assessment—judgment is entered of course (§ 246).

An adjustment of costs, *without notice* (where the defendant has appeared), does not render the judgment irregular. It is the adjustment of costs, *only*, that is irregular. It is the same, in principle, as the *taxation* without notice was formerly, irregular, and liable to be set aside; but never affected the judgment as to damages.

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A *readjustment on notice* cures the irregularity, the same as a *retaxation on notice* did formerly.

An affidavit of merits, for the purpose of being let in to defend, in a common law action, is not required to be *special* (as was required in chancery cases), where there are no suspicious circumstances attending the case. It must be *special* where such circumstances exist.

Oneida Special Term, February 1851.

CHARLES H. DOOLITTLE, *for Defendants*, moved to set aside a judgment.

J. W. JENKINS, *Opposed*.

GRIDLEY, Justice.—*First*. One irregularity relied on, to show that the judgment is irregular, consists of a defect in the summons. It mentions no court from which it emanates. In using a summons of this description, the plaintiff's attorney followed the form prepared by the commissioners on practice and appended to their report of the Code of 1848. But, notwithstanding it claims so high a paternity, it has been repeatedly pronounced, radically defective. In a considerable class of cases the Supreme Court and County Court have concurrent jurisdiction, and a summons should certainly inform a party in what court he is sued. (See 1 *Code Reporter*, 118; 2 *Id.* 75—128; 4 *How. Pr. R.* 154).

This would be a fatal objection to the judgment, had not the defendant's attorney given a general notice of appearance and thus waived the irregularity. It is true the fact of appearance is stated in a very general way; but we must conclude that, if the defendants appeared at all, it must be in this suit; otherwise the mention of the fact would be impertinent. Having appeared in this suit and in this court, the defendants admit themselves to be *regularly in court*; and therefore all defects in the summons, and its service, and even the total omission of any summons, at all, become immaterial. The defendants have taken a step in the cause which admits that they have been regularly brought into court. (See 2 *Hill*, 362; 3 *Howard's Pr. R.* 27; 7 *Coven.* 366; 2 *Howard's Pr. R.* 241)

Second. A second ground of irregularity, is the alleged omission to give notice of assessment, and of adjustment of costs not-

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withstanding a notice of appearance had been served. (1st.) As to the assessment. It appears that the complaint was duly verified, and was for the recovery of money only. In such case there is no assessment—judgment may be entered of course (*Code*, § 246).

(2d.) As to the adjustment of costs. The affidavit of the plaintiff's attorney states that though judgment was entered without a notice, that notice of a readjustment was given, at which readjustment the defendants did not appear. This was regular according to the old practice. The retaxation of costs, though *irregular*, never affected the regularity of the judgment; the only irregularity was in the taxation of costs, which would be set aside, unless they were retaxed on due notice (7 *Cowen*, 411; 2 *Wend.* 244). I am aware that it has been decided in the Superior Court, that the omission to give notice of the adjustment of costs renders the *judgment irregular*. The decision is founded on the 311th section of the Code, which requires a notice of adjustment of costs, before the entry of judgment. I have a great respect for the opinions of that court, but it seems to me that, in this instance, the decision was erroneous. It is founded on the inflexible nature of a statutory rule. In other words, the statute now requires a notice of the adjustment of costs; whereas, a rule of practice formerly required a notice of taxation. The taxation therefore without notice, was *irregular*, and that is the only consequence of an adjustment without notice now. *It is irregular*, and is liable to be set aside. But this statutory rule does not render the costs a part of the judgment in any different sense from what they were before the Code. There has always been a distinction between a judgment for damages, and a judgment for costs. Judgments are sometimes *reversed* as to costs, and *affirmed* as to damages. The most that can be said of the adjustment without notice, is, that it is *irregular*. So it was to *tax* costs without notice. The injunction of statute does not create a condition precedent to the entering of judgment, any more than the rule of court did formerly. And when we admit that the act is *irregular*, we do all that the statute requires of us. We also hold that a taxation without notice would render the taxation *irregular*.

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But we have seen that a retaxation on notice, with an order to endorse the deduction on the execution, would cure the irregularity, under the old practice. And there is no good reason, why it should not do it now. The notice of the readjustment of costs therefore rendered the judgment for costs regular, and the judgment for damages was never irregular.

(3d.) The defendant has read an affidavit of merits in a general form. The plaintiff cites several cases, which hold that the affidavits of merits under the Code should be special, as was required in chancery cases. I do not think that is indispensable in a case where there are no suspicious circumstances. I adhere to the Supreme Court rule (4 *Hill*, 61, *note*). But in this case, all the circumstances of the case tend to throw suspicion on the application. It appears by the defendants' own letters stating the account, between the parties, that the difference between them and the plaintiff, consists in a certain draft, which the defendants accepted. But the plaintiff has been compelled to take up this draft, after it was dishonored by the defendants. In addition to this, it appears that the defendants are in very straitened and it is feared, failing circumstances. All this was known to the defendants when they swore to merits. If they were, notwithstanding, advised that they had a good defence on the merits, they should have shown to the court in what it consisted.

The motion is denied with \$10 costs, but without prejudice to a new motion, if the party can by a statement of the facts of his defence, remove the cloud of suspicious circumstances in which he is involved.

 Fitch agt. Bigelow and Hunt.

SUPREME COURT.

FITCH agt. BIGELOW AND HUNT.

Where the *verification* of a complaint is made by the *attorney* instead of the party, the *reasons* must be stated why it is not made by the party (*Code*, §157). The omission to give such reasons being a defect upon the face of the verification, the defendant is at liberty to treat the complaint as if it were not verified, and to put in his answer without oath, and such is the proper course for him. A motion is unnecessary.

Albany Special Term, November 1850. This was a motion by the defendant Hunt, to set aside the verification annexed to the plaintiff's complaint. The summons and complaint claimed judgment for \$400 and interest, upon a promissory note. The complaint was verified by the plaintiff's attorney as follows: "Otsego county, ss. Jabez D. Hammond, attorney for the plaintiff being sworn, says, that the foregoing complaint is true of his own knowledge, except as to the matters which are therein stated on his information and belief and as to those matters he believes it to be true." (Signed, &c.)

It appeared that the plaintiff resided out of the state, and that the attorney was his agent, and took the note as such agent, and knew all the facts and circumstances of the case.

JOHN PERCY, *for Motion.*

J. NEWLAND, *Contra.*

PARKER, Justice.—The verification is defective. The Code requires (§ 157) that where the pleading is verified by the attorney, he should set forth in the affidavit his knowledge, *and* the reasons why it is not made by the party. The knowledge is here set forth, but the reasons why he made the affidavit are not stated. Good reasons are shown on this motion, viz., that the plaintiff resides out of this state; that the note in suit was taken by the attorney, and executed in his presence as the agent of the plaintiff, and that the plaintiff was not present when the business was transacted. But the statute requires these reasons to be set forth in the affidavit of verification.

Van Horne, Pres't of the Ag. Bank agt. Montgomery, Willis and Thomas.

The verification being insufficient upon its face, the defendant was at liberty to treat the complaint as if it were not verified and to put in his answer without oath. There was no injunction allowed upon the complaint. If there had been, the defendant might have moved to dissolve it on the ground of the defective verification. So also, if the insufficiency was not apparent upon the face of the paper, but depended on proof *aliunde*, as that the officer taking the affidavit was a fictitious person, or was incompetent to act in the case, a notice by the defendant would probably be necessary (*Gilmore vs. Hempstead*, 4 *How. Pr. Rep.* 153). But in this case no motion was necessary. There was an omission of a material statement expressly required by the statute. If a party may omit a part he may omit the whole of the requisite affidavit. The practice does not depend on the proportion omitted.

I think it is clear that the defendant might have put in his answer without verification, and that such was his proper course.

The motion must be denied but without costs, and the defendants must have ten days further time to answer.

SUPREME COURT.

VAN HORNE, President of the Agricultural Bank, agt. MONTGOMERY, WILLIS and THOMAS.

The time of the *service* of a copy complaint, when made by mail, is the time when it is *mailed*; not when it is *received*. (*See Peebles agt. Rogers*, *ante* page 208.)

The verification of a complaint, "that he had read the complaint, and that the same was true according to the best of his knowledge and belief," *held*, to be no verification under § 157 of the Code, even if made by the party; much less if made as attorney or agent, when the *means of knowledge* should be set forth. (*See Fitch agt. Bigelow and Hunt*, *ante* page, 237.)

If the complaint is not verified, in an action upon a promissory note, *notice of assessment of damages* must be given, where the defendant has appealed. The judgment is irregular if such notice is not given.

In common law actions an *affidavit of merits* in a general form pursuant to the rule as laid down in the old Supreme Court rules, and in the 4th *Hill*, 61, *note*, is sufficient, in a case where there are no suspicious circumstances thrown upon the application. (*See Dix agt. Palmer and Schoolcraft*, *ante* page 233.)

an Horne, Pres't of the Ag. Bank, agt. Montgomery, Willis and Thomas.

Oneida Special Term, Feb. 1851. The defendant Thomas, moves to set aside the judgment, as respects himself, which was entered on the twenty-fifth of January last; and to be permitted to answer. The summons was served on the defendant Thomas, on the 2d of December; a notice of appearance and a demand of a copy of the complaint was served by the attorney for the defendant on the plaintiff's attorney on the 10th of the same month. On the 21st of December the copy complaint was received, and entered as received in the register of the defendants' attorney on that day; and on the 29th January an answer was mailed at Utica to the plaintiff's attorney who resides at Herkimer.

WM. J. BACON, *for Motion.*

J. A. RASHACK, *Contra.*

GRIDLEY, Justice.—The time of receiving the copy of the complaint was not the service, but the time of mailing it; and that it sworn to have been done on the 14th of December. It is indeed an unusual event that the letter should have been seven days in traveling from Herkimer to Utica; but it is *positively* sworn that the letter was mailed on the 14th, and Messrs. Bacon & White did not preserve the envelope, so as to determine when it was actually put in the post office. The answer was therefore served too late, and was accordingly returned with that information on the next day after it was received.

The complaint purported to be *verified*. It was sworn to by Harvey Doolittle, the cashier of the bank, and he states that "*he had read the complaint and that the same was true according to the best of his knowledge and belief.*" This is no verification under section 157, if the cashier is to be regarded as a party. Still less, is it a good verification if he supposed to act as an agent or attorney; for then he should set forth his means of knowledge.

The action was on a promissory note, and the complaint not being verified, the damages must have been assessed by the clerk, and as a notice of appearance was given, the defendants' attorney was entitled to five days notice of assessment (*section 246 of*

Van Horne, Pres't of the Ag. Bank agt. Montgomery, Willis and Thon.

the Code). This notice was not given, and the judgment is therefore irregular, and must be set aside.

Still the defendants' time to answer has expired, and to enable him to plead, he must obtain the leave of court. He has shown a mistake as to the time when an answer was due, which is satisfactory; and he has made an affidavit of merits in a general form pursuant to the rule as laid down in the old Supreme Court rules, and in the 4th *Hill*, 61, *note*.

I am aware that it has been said in several cases, since the adoption of the Code, that the affidavit of merits should be special, setting up the facts, which constitutes the ground of defence, conformably to the practice in the Court of Chancery. But I see no reason for adopting that practice in common law actions. The guards, which the rule of the Supreme Court provided, are sufficient, in a case where no suspicion is thrown on the application by the circumstances of the case. The circumstances *may be so* suspicious in their character, that a party would be called on to explain those circumstances, and to state the facts, on which he relies for explanation or avoidance, in his affidavit. That, however, was always the case; and affords no reason why, in an ordinary case at law, we should disregard the settled practice which has obtained in like cases since the court was established.

The result is, that the defendant is entitled to set aside the judgment with costs; but is obliged to ask as a favor to be permitted to answer, notwithstanding the time has expired. The proper mode is to grant the entire motion without costs (5 *Wendell*, 78).

James and others agt. Kirkpatrick

SUPREME COURT.

JAMES AND OTHERS agt. KIRKPATRICK.

A summons issued without mentioning any court from which it emanates is defective. (*See 4 How. Pr. R. 154; and Dix agt. Palmer and Schoolcraft, ante page 233.*)

An amendment of such a summons can not support the judgment entered in the action. It is irregular. Besides, the defendant must have liberty to appear and defend.

Albany Special Term, January 1851. This was a motion by defendant to set aside a judgment for irregularity. The ground was, that no court whatever was mentioned in the summons served upon the defendant. The service was made on the 5th December 1850. Judgment was entered on the 6th January 1851. There was no appearance by the defendant in the action.

JOHN J. COLE, *for Motion.*WILLIAM BARNES, *Contra.*

PARKER, Justice.—It was decided in *Walker vs. Hubbard* (4 *How. Pr. R. 154*), that the summons must apprize the defendant in what court it was returnable. The defendant in this case had no knowledge whether he was sued in this court or in the County Court, or Mayor's Court; nor did the defendant learn it was in this court, till his attorney was so informed by the plaintiffs' attorney, several weeks afterwards. The judgment entered upon such defective process is irregular and must be set aside.

The objection that this motion is too late is unavailable. The defendant did not know in what court to move, and he did not learn that the proceedings were in this court, or that any judgment had been entered upon them, till it was too late to move at the last motion court.

The plaintiffs' counsel asks for leave to amend, and seems to suppose that an amendment of the summons will support the judgment. But this is not so, such an order would be clearly unjust. The defendant has never yet had time for appearance and to answer; and he ought not to be precluded from setting up a de-

Van Rensselaer agt. Kidd.

fence, if he has one. The summons was so indefinite that he was not bound to respond to it. If the summons is made good by amendment, the defendant must have the same opportunity to put in a defence, that he would have had, if the summons had been sufficient in the first instance.

Nor is it necessary that the defendant should present an affidavit of merits, to entitle him to such relief. He moves on the ground of irregularity only, and every defendant, whether he have a defence or not, has a right to insist upon regularity of practice and the full time to answer allowed by law.

The plaintiffs are therefore at liberty to amend the summons and defendant must have twenty days to answer, after service on his attorney of a copy of the complaint.

The motion must therefore be granted on such terms, with \$10 costs.

8 How. 242—See Code § 3258.

5 How. 242—FOLLOWED, 6 How. 172, 173.

SUPREME COURT.

VAN RENSSELAER agt. KIDD.

The statute giving *double costs* is repealed by the Code. PARKER, Justice.
See 4 How. Pr. R. 239. (*There are adverse decisions upon this point in other districts. See 4 How. Pr. R.*)

It is too late to make application for double costs, or an extra allowance, after judgment at the general term on appeal.

Albany Special Term, Nov. 1850. This was a motion by defendant Kidd for a readjustment of the costs in this cause, and for an extra allowance. Kidd was prosecuted as Treasurer of Albany County, and having succeeded in the suit at the circuit and on appeal at the general term, claimed double costs under the statute, which had been disallowed by the clerk on adjustment.

J. K. PORTER, *for Motion.*

C. M. JENKINS, *Contra.*

PARKER, Justice.—I think the statute giving double costs is repealed by the Code. My reasons are stated in *Hallenbeck vs. Miller* (4 How. Pr. R. 239).

Moore agt. Gardner.

Nor can I award any extra allowance. That can only be done by the court before which the trial was had or the judgment rendered (*Rule 86*). So too, the value upon which the per centage must be computed can only be ascertained by the court or jury before whom the action was tried (*Code*, § 309).

If this was a proper case for an extra allowance, it could only have been granted at the circuit. The provision in regard to extra allowance is not applicable to a judgment on appeal (2 *Coms. R.* 570).

The costs of the original action were adjusted by the clerk and became part of the judgment from which the appeal was taken. That judgment has been affirmed and it is now too late to add to or diminish the costs thus adjudged.

This objection is applicable to both branches of this motion.
Motion denied.

SUPREME COURT.

MOORE agt. GARDNER.

The venue in a complaint is to be fixed irrespective of convenience of witnesses, where some or one of the parties reside, if either reside in the state (*Sections 125 and 126 of the Code, in connection with the 46th and 49th sections of the judiciary act*).

A change of the place of trial for the convenience of witnesses, is properly made, when the venue has been fixed in the proper county.

Oneida Special Term, February 1851.

J. P. HARRIS, moved to change the venue to the proper county under section 125 of the Code.

H. GARDNER, for the plaintiff, read an affidavit, alleging that several of his witnesses lived in the county where the venue was laid.

GRIDLEY, Justice.—The word “venue” is defined to mean “a neighboring place.” “The place from whence a jury are to come for the trial of causes” (*Jacobs’s Law Dictionary vol. 6 p. 354*). The word was used as synonymous with the place of trial, by all

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legal writers both in England and in this state, up to 1847. It is true that when the venue was *local*, the court would sometimes grant an order for a trial in another county, for the reason that an impartial trial could not be had in the county where the venue properly belonged. But *generally*, a motion to change the venue, in transitory actions, is the phrase used when the place of trial is sought to be changed to another county for the convenience of parties and witnesses. (See *Jacobs's Law Dictionary*, title *Venue*, where a very full history of the subject is given; *Tidd's Practice*; *Graham's Practice*, 160, 164, 462, 466; 4 *Hill's Rep.* (in note), p. 62 to 70, and cases there cited; and 2 *R. S.* (2d ed.), 277 and 330.) There was no necessity for a practical distinction between the "*venue*" and the *place of trial*, under the old system of practice. The provision for the return of writs to the proper clerk's office, and the fact that the judgment record was made up by the attorney as a distinct paper, and filed in the proper office, rendered it immaterial in practice where the venue was laid, in actions of a transitory nature. But when the clerk of each county was made a clerk of the Supreme Court, and when the judgment record came to be composed of the pleadings and papers filed in the cause, to be annexed together by the clerk (as was formerly done by the Register in the enrollment of a decree in Chancery), it became necessary to designate some county as the county of the *venue*, where the papers were to be filed, and the judgment record made up. That was done by the judiciary act in section 46. This section declares that the venue shall be laid in the county in which *some* of the parties reside (if they reside in this state); and if the venue be not so laid, it shall be changed to the *proper county with costs of the motion*, if a notice shall be given of such motion before the expiration of the time for pleading. By the 49 section provision was made for a *change of the place of trial* for the convenience of witnesses; and provides that the clerk of the county where the trial is had, shall certify the minutes of the trial, to the clerk of the county where the venue is laid, &c.; and the proceedings shall continue as though the issue had been tried in the county where the venue was laid.

Hinman agt. Bergen.

Now, in this case, the plaintiff laid his venue in Onondaga, where neither party resided; the defendant living in Oneida county. The defendant demanded to have the venue changed, before the time for answering expired, pursuant to section 126 of the Code, which was refused. This motion is then made to have the venue laid in the proper county. This does not necessarily respect the question of the convenience of witnesses, but it fixes the county where the papers are to be filed and the judgment record made up and the costs adjusted, &c. pursuant to the third rule of this court, and the forty-ninth section of the judiciary act. On receiving the demand, the plaintiff should have changed the *venue* to the proper county, and then moved to change the *place of trial* for the convenience of witnesses; and this he may do still in the event this motion is granted. The sections 125 and 126 of the Code, taken in connection with the 46th and 49th sections of the judiciary act, show that the *place* named in the complaint, or in other words, the *venue*, is to be fixed, irrespective of convenience of witnesses, where some or one of the parties reside, if either resides in the state.

The motion is granted with \$10 costs.

5 How. 245—*Contra*, 4 How. 246.

SUPREME COURT.

5 How. 245—*Compare* 2 Abb. 253; 15 Id. 136
10 Bosw. 697; 4 Duer 840; 6 How. 404; 9 Id. 332; 1
Id. 89; 15 Id. 154; 17 Id. 469.

HINMAN agt. BERGEN.

The sum of \$10, "for every circuit at which the cause is necessarily on the calendar and not reached or is postponed" (§ 307, *sub. 8*), is not allowable to the prevailing party, where the cause was postponed at his request, and for his benefit.

The plaintiff having recovered a verdict proceeded to have his costs adjusted by the clerk on notice.

The defendant appeared and opposed the allowance of \$10 for each of three circuits when the cause was regularly on the calendar, but postponed at the request, and for the accommodation of the plaintiff, by consent of the defendant. This appeared by the affidavit of the defendant's attorney, and also that the defendant

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was ready for trial at each of these circuits. This state of the facts was not denied by the plaintiff. The clerk allowed these items, and the defendant now makes his motion in the nature of an appeal, to have them stricken out.

WM. M. ALLEN, *for Plaintiff.*

JAS. L. CAMPBELL, *for Defendant.*

MORSE, Justice.—It is urged on the part of the plaintiff that section 307, sub. 8, which provides for the allowance of ten dollars “for every circuit at which the cause is necessarily on the calendar and is not reached or is postponed,” makes no exception on the ground that the postponement took place at the request and for the benefit of the party who seeks for the allowance. It seems to be supposed that this subdivision of section 307 is the only part of the statute which bears on the question as to these allowances. This is a mistake. The whole statute upon costs is to be taken together, and moreover is to receive a reasonable construction, which, that contended for by the plaintiff, is not.

The statute of costs in civil actions, after repealing all former fee bills, and existing rules controlling the right of a party to agree with his attorney or counsel, as to the measure of their compensation, provides for the allowance to the prevailing party “certain sums by way of indemnity for his expenses in the action,” which are “termed costs” (*See § 303 of the Code*). By section 307 these sums termed costs, are set forth, and the particular head of expense which each is to indemnify against, is specified. Thus the general language in section 303 is rendered specific. The sum specified for a particular stage of the action, or proceeding in the cause is by way of indemnity for the expense of that particular stage or proceeding. The proper reading of the latter clause of section 303 and sub. 8 of section 307 is together; the former specifying the end proposed and the latter the means of attaining that end. The plain rule laid down by the statute is that “ten dollars” shall “be allowed to the prevailing party by way of indemnity for his expenses for every circuit at which the cause is necessarily on the calendar, and not reached or is postponed.”

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These sums are to be allowed by way of indemnity for his expenses of the circuit, if allowed at all. To indemnify is to save harmless from loss or penalty. The plaintiff has suffered neither loss or penalty at the circuits from which he procured the trial to be postponed; so far from the postponement being to his loss it was to his benefit, and for his accommodation. If the defendant had insisted upon it he would have been entitled to receive these amounts; but he waived that. It would be inequitable; a discouragement to liberal and manly dealing among counsel; and contrary to the plain intention of the legislature to allow these items. Thirty dollars must be deducted from the bill of costs taxed by the clerk.

5 How. 247—FOLLOWED, 6 How. 21.

SUPREME COURT.

DARROW agt. MILLER.

To authorize an order upon a motion to strike out an answer as frivolous, it must appear that the answer is a "sham pleading" (Code, § 152), which does not necessarily follow from its being merely frivolous.

An answer which is shown by its falsity or palpable frivolousness to be put in for delay merely, or other improper object, will be stricken out under § 152, as a sham defence, in the same manner and for the like reason, that a plea embracing the same matter would have been stricken out under the former practice.

No *affidavit* need be served on the opposite party with notice of motion for judgment under § 247.

Where the notice of motion asked to strike out the answer on the ground of the frivolousness thereof "or for such other or further order as the said justice shall deem proper to grant," held, that judgment on account of the frivolousness of the answer, could not be given under § 247. The words "rule" or "order" in the Code, in no case mean a judgment.

At Chambers, Dec. 27, 1850. The plaintiff's attorney gave the defendant's attorney notice that he would move this day at the office of the justice "for an order that the answer of the defendant to the complaint in this action be stricken out on the grounds of the frivolousness thereof with costs, or for such other or further order as the said justice shall deem proper to grant." The plaintiff's counsel now moves upon this notice and the com-

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plaint and answer, that the answer be stricken out, or that the plaintiff have judgment on account of the frivolousness of the answer. Various objections are taken by the defendant's counsel which are noticed in the following opinion.

C. O. POOLE, *for Plaintiff*.

C. R. GOLD, *for Defendant*.

SILL, Justice.—The specific relief asked for in the notice is, that the answer may be stricken out as frivolous. To justify this order it must appear that the answer is a "sham pleading" which does not necessarily follow from its being merely frivolous. Sham answers and defences may be stricken out on motion (*Code*, § 152).

If an answer be *frivolous* the plaintiff may move for judgment upon it in court, or before a judge out of court, and judgment may be given accordingly (§ 247). The mischiefs which these sections of the Code, were designed to remedy, have, I think, as well as the remedies themselves, been somewhat confounded. "A sham pleading (says Mr. Chitty), is one known by the party to be false, and put in for the purpose of *delay, or other unworthy object*" (1 *Ch. P.* 574). Bouvier says, "A sham plea is one entered for mere purposes of delay;" it must be of a matter which the *pleader knows to be false*" (2 *B.* 375). It seems by these definitions that the want of good faith, and the improper motive with which a plea is put in, are the important circumstances which give it character as a sham defence; and its falsity when admitted or unquestionably ascertained, is deemed sufficient evidence of the design with which it is interposed.

It was the practice of the English courts to allow, upon special application, showing the plea to be false, judgment to be entered as for want of plea (1 *Chitty Rep.* 564; 5 *Barn. & Ald.* 750; 2 *Id.* 197). And it was the settled practice of the late Supreme Court of this state, to strike out false pleas, upon an affidavit of their falsity, unless the parties pleading, would swear to their truth (*Brewster vs. Bostwick*, 6 *Cowen*, 34; *Belden vs. Devoe*, 12 *Wend.* 223; *Oakley vs. Devoe*, *Id.* 196; *Broome Co. Bank, vs. Lewis*, 18 *Wend.* 565). This was not testing the

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truth of a pleading (as has been said I think too hastily) upon affidavits. It was merely calling upon the defendant, when suspicion was thrown upon the good faith of his defence, by the plaintiff's affidavit of its untruth, to vindicate that good faith by his own oath.

The most numerous examples of sham pleadings, are those which are good in form, but false, and hence they are not what are usually called frivolous pleadings. There is, however, another kind of defences which, though not literally within the definition of Chitty and Bouvier, would, in my opinion, be now classed with sham pleadings. These are such as may be true in point of fact, but are so impertinent, or so *grossly* frivolous that the court can not but see that the object is to delay or perplex the plaintiff instead of presenting a defence. The objection to such a pleading is the same in principle as that to a pleading which is known to be false, both being a fraud upon the practice of the court and a mockery of legal proceedings.

The late Supreme Court adopted the practice of striking out pleas which were *palpably frivolous* (Heaton vs. Bartell, 13 Wend. 672; Lowry vs. Hall, 1 Hill, 663), but to justify striking them out they must be not only frivolous, but palpably so, and to a degree that will satisfy the court that they were interposed merely for delay or with some other improper motive (Many vs. Van Arnum, 1 Hill, 370; Fisher vs. Pond, *Id.* 672; Melville vs. Hazlett, 18 Wend. 680; Davis vs. Adams, 4 Cow. 142; Lowry vs. Hall, 1 Hill, 663; and see *Balmanno vs. Thompson*, 6 Bing. N. C. 153). The 152d section of the Code simply applies the former practice of striking out sham defences to the new system of pleading, and an answer which is shown by its falsity or *palpable* frivolousness, to be put in for delay merely, or other improper object, will be stricken out as a sham defence, in the same manner and for the like reason, that a plea embracing the same matter, would have been stricken out under the former practice.

But a pleading may be frivolous, and still be interposed in good faith (Miller vs. Heath, 7 Cow. 101; Patten vs. Harris, 10 Wend. 623); and unless the want of good faith in the pleader, is mani-

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fest, the pleading, though technically frivolous, should remain on the record. For a party has the right to have any defence honestly interposed, passed upon, not only in the court of original jurisdiction but in a court of appeal. In such a case, the remedy of the party alleging the frivolousness of the pleading is, if he desire a summary decision, to move for judgment under section 247 of the Code.

The present answer is, I think, frivolous, though I am not satisfied that it was interposed in bad faith or with an improper motive and therefore should not be stricken out. If this were otherwise, this order could not be granted at chambers; there is no provision for entertaining a motion to strike out pleadings out of court.

If such order can not be granted, the plaintiff asks for judgment on the ground of the frivolousness of the answer under section 247.

To this the defendant objects that there should have been an affidavit served with the notice of the motion, showing the service of the complaint and answer; and that no more than twenty days have elapsed since the service of the last pleading. There is no rule limiting the time for moving for judgment on a frivolous answer, to twenty days after its service, and no good reason is perceived for adopting such a rule.

Nor was any affidavit necessary as a foundation for the motion for judgment. It is said in Monell's Practice, which is cited by the defendant's counsel, that an affidavit is necessary. But a mistake is made there, probably, by confounding this motion for judgment with the practice of striking out false pleas. The judgment must be granted or refused upon what appears in the pleadings alone, and an affidavit if served could not be taken into the account in deciding this question. In this respect it is like a motion in court, for judgment upon a demurrer or upon a pleading not answered.

I am not speaking of the ex parte proof of the service of the complaint, or reception of the answer, which might be necessary to bring on the motion, if the defendant did not appear and ad-

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mit the service. The decision is that no affidavit need be served on the opposite party with notice of motion for judgment under section 247.

The defendant also objects on the ground that the notice is not adapted to the relief under the section last cited; and this objection appears to me well taken. The general clause under which judgment must be given, if at all, asks for such other "order," &c. Had the word "*judgment*" or "relief" been used in its stead, this objection might possibly have been disregarded, since the frivolousness of the answer is the specified ground of the application. But in the Code the word order is made to exclude the idea of a judgment. It means a written direction of a court or judge, other than a judgment and not included in it (245-400). Under the Code the words rule and order in no case mean a judgment. I feel constrained to hold upon authority that this relief can not be given under this notice (See *Many vs. Van Arnum*, above cited, and *Shear vs. Hart*, 3 *How. Pr. R.* 75). The motion is denied with \$10 costs, without prejudice to another motion for judgment on the ground of the frivolousness of the answer.

SUPREME COURT.

BAKER agt. SWACKHAMER AND SWACKHAMER.

Where an order of arrest is granted on showing that a sufficient cause of action exists (§ 179 and 181), the defendant, upon affidavits (§ 204 and 205), is not entitled to have the order vacated, upon the ground that no special cause for requiring bail is set up in the plaintiff's affidavit upon which the order was granted.

The reasons which would have justified the holding of a defendant to bail under the former practice, are not now required to be stated, where a *sufficient cause of action* (§ 179 and 181) is set forth.

Kings Special Term, Jan. 1851. Action for Libel. The defendants obtained an order to show cause why the order of arrest made in this action by the Hon. S. E. Johnson, county judge, should not be vacated or the bail required thereby be reduced.

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The motion to vacate is made upon the ground that no cause for requiring bail is set up in the affidavit presented to the county judge. It is conceded that the affidavit sets forth a cause of action, and that it does not contain any reason which would have justified the holding of the defendants to bail under the former system of practice.

A. D. SOPER, for the defendants, insisted that the legislature intended only so far to modify the former practice as to allow the order of arrest to be made on showing a cause of action within the 179th section (see §179-80-81); and by sections 204-5 to permit the defendant to come in and move to vacate, upon affidavits showing that none of the grounds for holding to bail under the former practice existed when the order of arrest was made, or at the time of the application to vacate.

Mr. BOUTON, for the plaintiff, insisted that the order of arrest being admitted to be regular when made upon an affidavit showing a sufficient cause of action, it would be absurd to say that it should become irregular or void upon the affidavit of the defendant, when no change of facts had taken place. Security was also required to be given by the plaintiff for the payment of costs in the action, and damages for the arrest, if judgment should be passed for the defendant.

MORSE, Justice.—There is no doubt that the present is a case where, under our former practice, the defendants could not be held to bail. This is an action for libel, and cause of action is shown by the plaintiff's affidavit, sufficient to justify an order of arrest, if it is not now necessary for that purpose to show some special cause for requiring bail. The good sense and practical utility of the former rule, I have never heard questioned anywhere. But it has been thought wise by the legislature to extend the power of plaintiffs to arrest and hold to bail, in this class of actions. That they have done so is too clear, I think, to be doubted, from the plain declaration in section 179, "that the defendant may be arrested where the action is for an injury to character," together with a further declaration (§ 180 and 181)

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that an order of arrest may be made where it appears by the affidavit that a sufficient cause of action exists, and is one mentioned in section 179.

It is provided by section 182 that the plaintiff, with or without sureties in the discretion of the judge applied to, on obtaining an order of arrest, must undertake in writing to pay costs and damages if he fails in the action.

I have no doubt that the county judge was right in granting the order to arrest. The provision in section 204, when read in connection with section 205, evidently provides for a case where a sufficient cause of action is not set out in the plaintiff's affidavit, or one not coming within the 179th section. This goes upon the ground that a judge may make a mistake in granting the order. That this was intended by the legislature will be more apparent when we see that section 205 provides for the case where the defendant moves upon affidavits, and most palpably implies that defendant may move to vacate or reduce without affidavits; that is, upon the plaintiff's own showing. That the amount of bail is unreasonably high, I think perfectly clear. The publication is *prima facie* libelous, but not of such an aggravated character as of itself to require any thing more than reasonable surety that the defendants will be forthcoming to answer any judgment that may be rendered against them. It appears by the undisputed affidavits of one of the defendants that he is a permanent resident of the county of Kings; a freeholder and householder therein, and that the other defendant is a resident of the said county and a householder therein. A less amount of security for appearance and answer, must be considered requisite in a case where the parties are permanent residents, as it appears by the affidavit these defendants are, than if they were transient persons. The amount of bail must be reduced to five hundred dollars; a sum which I think sufficient to secure the just objects of bail in this case, and not so large as to be oppressive. Enter an order reducing the amount of bail to \$500

The Rochester City Bank and Lester, agt. Suydam and others.

SUPREME COURT.

THE ROCHESTER CITY BANK and LESTER agt. SUYDAM, SAGE & Co.
and SUYDAM and ELY.

The rule prohibiting the disclosure of confidential communications from a client to his attorney does not extend to an attorney acting under a general retainer as attorney, and a general employment as agent, or factor, in relation to the debts and other property of the client in a certain location, where the facts disclosed consist mainly of the instructions received from time to time, as to the management of this business.

A communication to be brought within the protection of the rule, if it does not relate to any suit or legal proceeding commenced or contemplated, should at least be made under cover of an employment *strictly professional*, and should be such as the business to be done required to be made; it should also be of a *confidential nature*, and *so considered at the time*; and should be shown to have been made with direct reference to the professional business upon which it may be supposed to bear.

Where an attorney or counsel has *an interest in the facts communicated* to him, and when their disclosure becomes necessary *to protect his own personal rights* he must of necessity be exempted from the obligation of secrecy.

Monroe Special Term, January 1851. This is a motion in behalf of the defendants, to strike out or suppress the affidavit of the defendant Ely, annexed to the complaint, together with certain portions of the complaint itself.

The facts so far as they are necessary to be stated, to present the point raised by the motion, are as follows: The Rochester City Bank and the plaintiff Lester, a banker in Rochester, had discounted during the spring and summer of 1850, bills drawn upon and accepted by the firm of Suydam, Sage & Co. of New York, amounting in the aggregate to \$60,000 or upwards, which bills were all protested and returned unpaid, the acceptors having failed and assigned their property to the defendant Ferdinand Suydam, in trust for the payment of debts. The plaintiffs in their complaint allege that the bills were all endorsed by the defendant Alfred Ely, and that before, and at the time of the discounting thereof, they were respectively informed by the said Ely, that he

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as the agent and attorney of said Suydam, Sage & Co., had in his hands and under his control and management, a large amount of property, real and personal, belonging to them, consisting of several large and valuable flouring mills, together with bonds and mortgages, and other demands, amply sufficient to indemnify him against his responsibility as endorser, and that he was fully secured for endorsing said bills, by a lien or mortgage upon all such property, and that he exhibited to them papers purporting to give him such lien, which they claim to be available for that purpose; and they aver that the bills were all discounted by them upon the credit of Ely as endorser, and relying upon the property thus in his hands, and his lien thereon, as their security in the premises. They claim to have the property in Ely's hands applied to the payment of the drafts, and pray for an injunction and the appointment of a receiver.

A very large portion of the statements contained in the bill, particularly those which go to show the nature and amount of the property in Ely's hands, upon which the lien is claimed, are avowedly made upon information derived from Ely, consisting to a considerable extent of letters, and extracts from letters, received by Ely from the defendants Suydam, Sage & Co., during his employment by and correspondence with that firm. These statements in the complaint are verified solely by the affidavit of Ely annexed thereto. It is claimed that this affidavit should be suppressed, and so much of the complaint as is based upon information derived from said Ely stricken out, on the ground that Ely was an attorney and counsellor at law, and that the facts disclosed by him consisted of confidential communications from the other defendants, as his clients, to him as their attorney and counsel.

A. WORDEN and S. MATHEWS, *for Plaintiffs.*

J. A. VERPLANCK and G. R. J. BOWDOIN, *for Defendants.*

Selden, Justice.—The facts relied upon to support the motion appear from the complaint itself, and the affidavit sought to be suppressed. They show that from the year 1843, up to the time

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of the commencement of this suit, Ely had been the general agent and attorney of the firm of Suydam, Sage & Co. to manage their property, collect their debts, and transact for them a very extensive and varied business in the western part of this state; that he prosecuted for them as attorney, during this time, a variety of suits, and recovered judgments to a large amount, and likewise defended suits brought against them; that he foreclosed several mortgages, bid in the property as their agent at the master's sale, and controlled and managed the property afterwards; leasing the same from year to year, and collecting the rents, and selling portions thereof from time to time, pursuant to instructions from the defendants Suydam, Sage & Co. Indeed the statements in the complaint and affidavit, warrant the assumption, that Ely, during the period mentioned, was acting under a general retainer as attorney, and a general employment as agent, or factor, in relation to the debts and other property of the firm of Suydam, Sage & Co. in western New York, and the facts disclosed by him to the plaintiffs, consist mainly of the instructions he received from time to time, as to the management of this business.

The counsel for the motion take the broad ground, that while this general retainer continued, the relation of attorney and client must be held to have existed, and that every communication to Ely during that time from Suydam, Sage & Co. touching their business, falls within the rule prohibiting the disclosure of confidential communications from a client to his attorney. It is essential to the success of the motion to sustain this position; because it was not shown upon the argument, and from my examination of the complaint I have not discovered that any of the information disclosed to the plaintiffs by Ely, consisted of facts communicated to him for the purpose of enabling him to prosecute or defend any suit commenced or contemplated, or with a view to obtaining his professional advice or assistance, in regard to any such suit, unless the enclosing to him of a bond and mortgage, with instructions to foreclose it if not paid, be considered as embracing facts of this description.

The question here presented is one of a nature extremely em-

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barrassing. Well might the learned annotator upon Phillips say (*Cow. & Hill's Notes*, note 280), "that the doctrine upon the point, seems quite unsettled by the English cases." He might with equal propriety have added, or the American.

The cases upon the subject are so numerous, as almost to defy perusal, and so conflicting as to render hopeless any effort to reconcile them. They are collected in so many of the modern elementary works, that it is unnecessary to refer to them here. The great point in dispute is, whether the privilege in question, is confined to communications made with a view to the prosecution, defence, or management of some suit, or other judicial proceeding, either actually pending or contemplated at the time, or whether it extends to all communications, made to an attorney or counsel, by one who employs him on account of his supposed professional skill, to transact any other business.

Both sides of this controversy are supported by great weight of authority, some of the ablest judges in the English courts having taken opposite sides upon the question. On looking into the cases, it seems to me, I confess, that in this, as in almost all cases of similar conflicts among judicial tribunals, the difficulty has arisen from courts having too often attempted to apply a rule, without having in view the reason upon which it is founded. In many of the cases upon this subject, counsel and sometimes courts have talked about the impropriety of disclosing that which was communicated in confidence, relying upon the secrecy of the recipient; as if the betrayal of a trust, or confidence reposed, had something to do with the matter; whereas nothing can be clearer, than that the rule in question rests upon no such foundation.

If the obligations of faith and honor to preserve inviolate a secret confided, formed the basis of the rule, where could those obligations be stronger, or more perfect, than in the case of the physician or the divine, and yet it was abundantly settled, that at common law the rule did not extend to either. The statute of this state (2 R. S. 406, § 91, 92), extending the protection to physicians and ministers under certain circumstances, is guarded in its provisions, and is based upon reasons peculiar to the cases pro-

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vided for. Indeed, if the foundation of the rule was such as we have been considering, no just reason can be given, why it should not extend to a confidential communication to a private individual, who is as much bound in honor to a faithful observance of the trust as an attorney or counsel.

It is equally clear, that it is not because attorneys and counsellors are officers of the court, that the latter interferes to prevent its own officers from violating a trust reposed in them; because if this were so, it is difficult to discover any reason why the same rule should not be applied to sheriffs, clerks, &c. who are equally under the control of the courts and upon whom the moral obligation to observe good faith is just as strong as upon an attorney.

Again, the rule is not founded upon any broad views of public policy, growing out of the inconveniences to society, of having confidential communications which the exigencies of the community require should be frequently made, liable to be disclosed, because this reasoning would apply with equal force to confidence reposed in many cases which have never been held to be within the protection of the rule.

The doctrine in question has a narrower foundation than any of these. It is simply this: Anciently, when lawsuits were comparatively rare, parties litigant came into court and prosecuted or defended their causes. They were not obliged, however, to be witnesses in their own cases, and could not be compelled therefore to disclose facts within their own knowledge alone. Afterwards when lawsuits became more numerous, and the law itself more complex, it became indispensable to have a body of men trained to and skilled in the laws, and the conducting of suits, and to have the business of courts transacted by these learned men. Suitors were therefore in a measure constrained to employ these professional men to carry on their litigations, and of course were compelled to disclose to them the facts within their own knowledge, bearing upon the matters in dispute. If the facts thus communicated were liable to be extorted from the attorney or counsel, suitors would hesitate to employ them, to the great inconvenience of the court, and obstruction of judicial business.

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The rule we are considering, therefore, was adopted to remove this difficulty, and was a mere extension of the immunity of the party to his substitute, the attorney. In other words, while the courts for their own convenience, encouraged their suitors to employ men of skill to conduct their suits, and to communicate to them the merits of their cases, they at the same time said that these communications should have the same inviolability as if they remained locked in their own breasts.

It was just because, the law constrained the disclosure for its own purposes, that the law protected it.

That this was the true origin and foundation of the rule is, as it seems to me, apparent; because it has been successfully shown that none of the other grounds upon which it has been sometimes supposed to rest, are tenable, and that if the rule had any other conceivable basis, it must embrace other cases than those of attorney and counsel, to which it has been uniformly limited.

But the position I have taken, is not without direct authority to support it. Of all the numerous cases to which I have referred in the course of the examination I have given this question, that in which the subject has been the most elaborately and as I think the most ably treated, is the case of *Annesly vs. The Earl of Anglesea*, before the barons of the Irish Exchequer (17 *How. State Trials*, 1139). The question was argued by several of the ablest members of the Irish bar upon each side, including the attorney and solicitor generals. The decision in that case, has a direct bearing upon the question presented by the facts of this particular case; but it is not for that purpose that I cite it so much as for its illustration and support of the position I have taken, as to the *origin* of the rule we have been considering.

I will quote here only the language of Mr. Baron Mounteney on this subject. He says at page 1240, "Mr. Recorder hath very properly mentioned the foundation upon which it hath been held, and is certainly undoubted law, that attorneys ought to keep inviolably the secrets of their clients, viz. That an increase of legal business, and the inability of parties to transact that business themselves, made it necessary for them to employ (and as

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the law properly expresses it *ponere in loco suo*), other persons who might transact that business for them. That this necessity introduced with it, the necessity of what the law hath very justly established, an inviolable secrecy to be observed by attorneys, in order to render it safe for clients to communicate to their attorneys all proper instructions for the carrying on of their causes, which they found themselves under the necessity of entrusting to their care." The views of the other judges harmonize with those of Mr. Baron Mounteney, but they are less explicit upon the point.

- Again, in the case of *Dixon vs. Parmelee* (2 Ver. R. 185), Mr. Justice Paddock, in considering the same question, uses the following language: "And this distinction seems to give a clue to that which is said to be the origin of the law, which is, that in early days suitors brought in person their complaints before the king, and afterwards his court; that as business increased, the administration of justice approximating to a science, and the necessity of forms sensibly felt, it became absolutely necessary that there should be a set of men to stand in the place of suitors, called attorneys, and manage their causes, to encourage which and bring the same into practice, it also became necessary for courts to adopt a rule by way of pledge to suitors, that their secret and confidential communications to their attorneys, should not be drawn from them either with or without the consent of such attorney."

These authorities seem to me to accord so perfectly with the conclusions to which a careful analysis of the principles applicable to the subject, and of the cases acknowledged to be law, would lead us, that I feel justified in adopting them as a true exposition of the rule. There are many other cases having the same tendency, but I cite only these, as bearing most directly upon the point. It follows from this reasoning, that originally no communications were protected except such as related to the management of some suit or judicial proceeding in court, then actually pending, or in the contemplation of the parties at the time; and if the numerous cases in which a wider scope has been

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given to the rule, should be held to have in some degree enlarged its application, this departure from the true principle, ought to be confined within as narrow limits as possible, since the whole doctrine is in conflict with the general policy of the law. Fortunately, we are not embarrassed in endeavoring to place this matter upon a just basis, by any decisions of our own courts, no case in this state having extended the rule beyond what is here contended for, unless it be that of *Wilson vs. Troup* (7 *Johns. Ch. R.* 25; 2 *Cow. R.* 195, *S. C.*), and even there, the business in relation to which the communication was made, was quasi of a judicial nature.

I think the communication to be brought within the protection of the rule, if it does not relate to any suit or legal proceeding commenced or contemplated, should at least be made under cover of an employment strictly professional, and should be such as the business to be done required to be made; it should also be of a confidential nature, and so considered at the time, and should be shown to have been made with direct reference to the professional business upon which it may be supposed to bear. I have discovered nothing of this kind in the facts shown in this case, to have been communicated to Ely, and by him disclosed to the plaintiffs; none of these facts seem to have been communicated to Ely with a particular view to any legal business to be done by him either as attorney or counsel, but they appear to have come to his knowledge, from time to time, during a seven years employment; sometimes as attorney, and constantly as agent, and to have related as much to his business in the latter capacity as the former.

Whether the basis of the rule, therefore, for which I have contended be the true one or not, I do not see how this case is to be brought within any well established expansion of it.

The motion to suppress or strike out therefore, in my opinion, can not prevail.

But independent of this reasoning, and admitting all the previous conclusions to be erroneous, there is still another ground upon which, in my judgment, this motion must be denied. I think

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that where the attorney or counsel has an interest in the facts communicated to him, and when their disclosure becomes necessary to protect his own personal rights, he must of necessity and in reason be exempted from the obligation of secresy. For instance suppose a client makes a private and confidential statement of facts by letter, to an attorney employed to conduct a suit, inducing him to take a particular course with the suit, which proves eminently disastrous, and he is afterward prosecuted by his client for unskilful management of the cause, can it be claimed that he can not produce the letter in his justification? I apprehend not. It would be most harsh and unjust to place the attorney in a position in which he must act in view of virtual instructions from his client, and yet deprive him of the only means of protecting himself. Many other cases might be supposed, falling within the same principle, and the present seems to be one of the class. Here the attorney has a large amount of property in his hands, which has accumulated during a seven years employment, the nature and extent of which is shown by his correspondence with his clients. Under these circumstances, he is induced by them to assume heavy responsibilities upon the faith and security of this property. Is he to be deprived of what may very likely be his only means of showing in what this property consists, by producing his clients' letters in relation to it? I think no such construction has ever been put upon the rule in question. His clients by giving him a direct interest in the facts, from time to time, communicated to him, and by dealing with him upon the footing of those facts, have, as it strikes me, voluntarily waived their right to concealment as between themselves and the attorney.

If then, Ely would have a right in a legal contest between himself and his clients, in regard to his indemnity against the responsibilities assumed, to make use of the facts within his knowledge; then I do not see why the plaintiffs, who are in equity subrogated to his rights, may not do the same. This suit is virtually for his benefit, as the application of the property claimed to the payment of the drafts, discharges him *pro tanto* from responsibility.

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There is still another question presented by this motion. I refer to the effect which the recent change in the law in regard to the examination of the parties as witnesses, should have upon the rule of law involved in this motion; as the consideration of this question, however, in the view I have taken of the subject, is not necessary to the decision of the motion, I shall not attempt to pass upon it here.

The motion must be denied with ten dollars costs for opposing.

SUPREME COURT.

MUNSON AND SILL agt. WILLARD.

Twenty days is a reasonable time to be allowed for the service of a complaint, after demand under section 130 of the Code. (*The opinion in Colvin agt. Bragden, ante page 124, concurred in.*)

Jefferson Special Term, Dec. 1850. This suit was commenced by summons served the 13th day of November last. On the 19th of the same month, the defendant's attorney in pursuance of sec. 130 of the Code, demanded in writing a copy of the complaint; the demand not being complied with on the 21st the papers for this motion to dismiss the complaint under section 247 were served.

J. F. STARBUCK, *for Defendant.*

T. C. CHITTENDEN, *for Plaintiff.*

HUBBARD, Justice,—The question arising on this motion is whether the plaintiff has unreasonably neglected to serve the complaint. No time is prescribed by the statute or rules of the court within which service is to be made, and hence as the practice now is, the question of reasonable diligence must be determined by the facts and circumstances of each case. To prevent the evils of uncertainty and contrariety of decisions resulting from such a practice, some general rule should be established.

Before the Code, a standing rule defined the time of service of the declaration after notice (*Rule 14 of the Rules of 1847*).

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Thirty days is there prescribed to be a reasonable time. Under the Code the summons, as the commencement of the suit, takes the place of the *capias ad respondendum*, and by analogy, thirty days would be a reasonable time for the service of the complaint. Perhaps that length of time is not requisite in ordinary cases, but where a rule of general application is established, ample time should be given to *prepare the pleading and serve in the extreme parts of the state*. In this case the parties and attorneys reside in the same place, but the requisition of the defendant that the complaint be served within *two days*, can not be sustained. Under any circumstances that short time is unreasonable, requiring a most extraordinary diligence. The present practice should be assimilated to the former as far as practicable in matters sanctioned by time and experience, and hence twenty days at least should be allowed within which to serve complaint after demand. The necessity for time is as imperative now as formerly.

This motion is made, it is alleged, upon the authority of the case of *Littlefield vs. Murin* (4 *Howard*, 306). There is a remark, in the opinion of that case, to the effect that perhaps under ordinary circumstances, twenty-four hours would be a reasonable time within which to serve complaint after demand. But it is to be observed that the question of diligence did not arise; the decision was upon the principle that, an omission to serve from August to December, created a presumption of abandonment of the suit. The doctrine of that case is sound; but when Justice Allen alluded incidentally to a supposed analogy with the practice under a peremptory order for a bill of particulars, he evidently from his guarded language, expressly stating that the question of diligence *did not arise*; did not anticipate that the case was to be quoted as authority requiring the complaint to be served in the short space of twenty-four hours. That case does not authorize this motion. The motion must be denied, but without costs, as the practice is unsettled.

Since the decision of this motion as above, the case of *Colvin vs. Bragden* (5 *How. Pr. R.* 124), has been published. Justice PAGE decides that twenty days is a reasonable time, ordinarily,

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to serve complaint, after demand. In that decision I fully concur. The time is perhaps sufficient to meet all exigencies of a reasonable and convenient practice. Such a general rule would tend to restore the harmony and beauty of the former system in motions of *non pros.* like the present.

5 How. 265—FOLLOWED, 6 How. 206, 211.
Contra, 5 Id. 272.

SUPREME COURT.

SCHOONMAKER agt. THE MINISTER, ELDERS &C. OF THE REFORMED PROTESTANT DUTCH CHURCH OF THE TOWN OF KINGSTON.

An application to dissolve an injunction made upon the pleadings—the answer being *verified*—must be regarded as an application made upon *affidavits* within the meaning of section 226 of the Code. Therefore affidavits may be read in opposition to the motion. (See *Krom agt. Hogan*, 4 How. Pr. R., 225.) Where the defendants, a Church Corporation, by their charter (in 1719) had confirmed to them their church lot and *burying ground*, which had been previously, and while they were unincorporated, granted to them by the trustees of the freeholders and commonalty or the corporation of K.; that they had ever since been seized in fee of the lot, and had held the sole possession, occupancy and control thereof; that no burials had ever been made there without their consent and permission. And the plaintiff alleged that the burying ground had been used by the inhabitants of K. as such, from the first settlement of the town until the year 1832, when from prudential motives the authorities of K. prohibited it from being further used for that purpose; that a portion of the ground had been thus occupied by the plaintiff's family, and a great number of her relatives had been buried there, &c.; that the defendants, had resolved to erect a new church edifice thereon, in doing which it was alleged, would cover, build over, or disturb the graves of the plaintiff's relatives, &c.; and insisted that the burying ground had been dedicated and appropriated to the public use, as such, that the defendants had no right or authority to divert it to any other use. *Held*, that the most that could be claimed by the privilege or license thus gratuitously conferred, would be, that the graves of the plaintiff's dead should remain undisturbed so long as the ground should continue to be devoted to the purposes of sepulture. An absolute right to a perpetual occupation of the land could only be acquired by grant. (Upon this point the JUSTICE refers for illustration to an ancient and undoubted authority—*Genesis*, ch. 23—where Abraham rejected the gratuitous offer of the children of Heth to bury his dead in their lands, and insisted upon an absolute conveyance on payment of full consideration "of the field of Ephron and the cave therein, and all the trees that were in the field, and in all the borders that were round about to be made sure to him for a possession of a burying place.

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A dedication to public or pious uses, depends upon the intention of the original owner. Long usage, with the continued acquiescence of the original owner, is usually sufficient evidence of such dedication. But where there are circumstances which rebut the presumption of an *intention* to dedicate arising from long usage, there is, in fact no dedication.

At Chambers, November 1850. This was a motion to dissolve a temporary injunction granted by a judge at chambers, restraining the defendants from erecting any church edifice or other building upon the old burying ground situate in the village of Kingston, or digging up or removing any earth therein, or therefrom, or doing any other act or thing, so as in any way or manner to interfere with the graves, or grave stones, erected at the graves of the ancestors, brother, husband and children of the plaintiff, or enclosing or covering such graves by, or with any structures or erections whatever, and from diverting the grave yard to building purposes, or to any other purpose than as a place of repose for the dead.

The plaintiff alleges, in her complaint, that the ground in question had been used by the inhabitants of Kingston for a burying ground from the first settlement of the town until the year 1832, when from prudential motives, the directors of the village corporation prohibited further burials there; that the families of the older residents of the town had in the ground, their particular localities for the burial of their dead; that a portion of the ground has been occupied by the plaintiff's family for that purpose, and a great number of her relatives have been buried there, and suitable grave stones have been erected and maintained at their graves; some of them by and at the expense of the plaintiff herself; that the defendants have resolved to proceed forthwith to erect a large stone edifice upon the burying ground, and in doing so, will cover, build over, or disturb the graves of the plaintiff's relatives, and, in digging for and preparing the foundation of the church, they must, of necessity, disturb the ashes and violate the graves of these relatives, and remove the monuments which mark their localities. The plaintiff insists that the lot has been dedicated and appropriated to the public use as a burying ground,

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and that the defendants have no right or authority to divert it to any other use.

The defendants state that they were incorporated in 1719, and by their charter they had confirmed to them the title to their church lot and burying ground, which had been previously, and while they were yet unincorporated, granted to them by the trustees of the freeholders and commonalty of the corporation of Kingston; that they have ever since been seized in fee of the lot and have held the sole possession, occupancy and control thereof; that no burials have ever been made there without the consent and permission of the defendants, and under the direction of their sexton or other officers; that no right of burial, in any particular part of the premises, has ever been granted by the defendants, or acquired by any other person; that from the year 1688 to 1832, the defendants had maintained a church edifice upon the ground in question; that in 1832 they erected a new house on the opposite side of the street, which they have since occupied, but that now they are desirous of erecting a new and larger house upon or near the site of their old church edifice, and have commenced making arrangements for that purpose. The defendants further state, that in making their arrangements and settling their plans they have had express reference to the present condition of the ground and its former use, and with a view to leave the remains of the buried dead undisturbed, have determined to build no basement to their edifice; to preserve all the grave stones and other memorials designating the graves, and either lay them within the edifice or remove them to some other portion of the ground at their own expense, as the surviving friends may desire; and generally, to remove and disturb no remains whatever, except at the request of relatives and friends.

Some other facts are stated both in the complaint and in the answer; but this statement is sufficient to present the question involved in the motion.

M. SCHOONMAKER, for Plaintiff.

J. C. FORSYTH and J. K. PORTER, for Defendants.

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HARRIS, Justice.—A question was made upon the hearing of this motion as to the right of the plaintiff to read affidavits in opposition to the motion. The defendants have put in their answer and have verified it by affidavit in the manner required by the 157th section of the Code. Upon this answer they found their motion to dissolve the injunction. The plaintiff insists that the motion is, within the meaning of the 226th section of the Code, “an application upon affidavit,” which entitles him to “oppose the same by affidavits or other proofs.” The defendants, on the other hand, insist that their affidavit verifying their answer is but a necessary part of their pleading, and that the motion to vacate the injunction upon the complaint and answer does not entitle the plaintiff to support the injunction by further affidavits. The former practice of moving to dissolve an injunction upon bill and answer is in favor of this construction; but although the provision of the Code is, in this respect, not very clearly expressed, I do not see how effect is to be given to it without allowing the construction for which the plaintiff contends. The 225th section provides, that the application to vacate an injunction may be made either upon the papers upon which the injunction was granted, *or*, “upon affidavits, with or without an answer.” The defendants’ application clearly belongs to the latter class, for they rely upon their verified answer, as well as the plaintiff’s papers. It must, therefore, be regarded as an application “made upon affidavits,” within the meaning of the 226th section of the Code. I think, therefore, that the opposing affidavits are properly to be considered in deciding the motion (*Krom vs. Hogan*, 4 *How. Pr. R.* 225).

Upon the merits I am satisfied that the injunction ought not to be continued. The defendants have, beyond a doubt, the legal title to the ground in question. If the plaintiff has any right there, it is because the ground has been devoted by the defendants to the purposes of a cemetery and by their permission the plaintiff has occupied it as a burial place. The most that this privilege, thus gratuitously conferred, can involve is, that the graves of the plaintiff’s dead shall remain undisturbed so long as the ground

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should continue to be devoted to the purpose of sepulture. An absolute right to a perpetual occupation of the land could only be acquired by grant. So Abraham thought 3700 years ago, when he declined the courteous offer of the children of Heth, to permit him to bury his dead in their lands. He insisted upon an absolute conveyance of the spot he had selected, and paid for it a full consideration. It was probably the only land he ever owned. At any rate it is the earliest instance of a recorded title to land (*Genesis* 23). He was himself a wanderer, but the sentiments of his religion, and the affection for his beloved dead, alike, prompted him to secure a place where their mortal remains might repose, undisturbed, until they should again be reanimated at the resurrection. Hence it was, that he rejected the license, so generously tendered to him, to bury his wife "in the choice of their sepulchres" and required the field of Ephron, and the cave therein and all the trees that were in the field, and in all the borders that were round about, to be made sure to him, for a possession, of a burying place."

The plaintiff supposes that the general and uninterrupted use of the ground, as a place of sepulture, with the consent or acquiescence of the defendants, amounts to a perpetual and irrevocable dedication to the uses for which it has been appropriated. But in this view I am unable to concur. There is no doubt that land may be, and often is, even without deed, dedicated by the owner to public or pious uses. When the public have entered upon the use of land so dedicated, so that to allow it to be reclaimed would be unjust, the dedication becomes irrevocable. Thus, plots of land have often been set apart by the owners, as places for burial, and having been used for that purpose, with the owners' assent, they become hallowed by that use and can not be reclaimed by the owner. *Beatty vs. Kurtz*, (5 *Peters*, 566), was such a case. There *Beatty*, in laying out a town, which subsequently became a part of the city of Georgetown, designated and set apart one lot "for the German Lutheran Church." That people consisted of a voluntary, unincorporated society, but they entered into the use of the lot, and for more than fifty years, had occupied it as a

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cemetery. It appeared that Beatty had, during his life time, constantly avowed that the lot was appropriated for the Lutherans, and that they were entitled to it. Under these circumstances, it was held that, as the lot had been originally consecrated to a religious use, and as it had become a depository of the dead, it could not be resumed by the heirs of Beatty. In like manner, public squares and streets have sometimes been laid out by the owner of the land, and when land bounded on these, has been sold and improved, with the understanding that the owner of the land, thus laid out, has permanently devoted it to public use, the dedication, from that moment, becomes perfect and irrevocable. Whether or not there has been such a dedication, depends upon the intention of the original owner. Long usage, with the continued acquiescence of the original owner, is usually sufficient evidence of such dedication. But where there are circumstances which rebut the presumption of an intention to dedicate arising from long usage, there is, in fact, no dedication, or at least no evidence of such dedication.

This is clearly so in the case before me. I am entirely satisfied from the facts presented, that the defendants never, for a moment, intended to surrender the ownership or control of the ground. On the contrary, they seem always to have exercised over it all the dominion consistent with the purposes for which it was originally granted. No person ever had a right to bury there, without the defendants' permission. Because that permission has been generally granted and perhaps generally taken, for granted, without actual application, the defendants have none the less right, when they choose to control the use of the ground. When the plaintiff's kindred and friends were deposited there, whether the privilege was actually granted, or is to be inferred from the defendants' sufferance, no right was secured in the land. In either case, it was but a license, and this never secures an interest in the land (3 *Kent*, 452). The most that this license implies is, that the body, when deposited in the grave, may remain unmolested until it decays. The inviolability of the last resting place of the dead has been a sentiment deeply cherished in all ages. It is the last

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wish of affection, when it renders back to the earth the body of one dear in life, *ut requiescat in pace, usque ad resurrectionem*. So universal is this feeling, that a wanton disturbance of the grave would, among any civilized people, be regarded as an offence to the living, as well as an indignity to the dead; and yet no positive rule of law forbids such disturbance. The suggestion of self respect and "a decent regard for the opinions of mankind," will always be sufficient to secure the place of sepulture from unnecessary molestation. The legal doctrine is, that "the common cemetery is not *res unius ætatis*: the exclusive property of one generation now departed, but it is the common property of the living, and of generations yet unborn, and subject only to the temporary appropriation (Gilbert vs. Buzzard, 3 Phillimore, 335).

In the most enlarged construction that can be given to the plaintiff's legal rights, those rights must be considered as satisfied. The feelings, which still prompt her to guard the soil with which the remains of her kindred have long since mingled, are natural and commendable. It is very manifest, from the facts before me, that the defendants have sedulously sought to guard against any unnecessary violation of those feelings. They seek to appropriate the land to the beneficial uses of the living. This it is their right, if not their duty to do. However painful it may be to the plaintiff to see the memorials which affection has erected in memory of her kindred removed, she has no legal right longer to divert the land to the barren preservation of those memorials. The injunction must therefore be vacated.

SUPREME COURT.

MILLIKIN agt. V. R. CARY, S. CARY and J. W. CARY.

The Code having abolished all forms of pleading inconsistent with its provisions and declared that the sufficiency of pleadings shall hereafter be determined by the rules which it prescribes (§ 149). *Held*, that, although there are actions of legal and equitable cognizance, between which; as heretofore, the constitution and laws recognize a distinction. Yet, but one uniform system of pleading and practice, is made applicable to both classes.

Therefore there seems to be no authority, for continuing a distinction between the pleadings in actions at law and suits in equity. The facts, as they are claimed by the parties respectively to exist, unaccompanied by a statement of the evidence or legal conclusions, should only be set forth in both classes of actions. (*These views seem to conflict with those expressed upon the same point in the opinion of the Rochester City Bank, &c. agt. Suydam, &c. ante page 216*).

Where matters are stated as evidence in a complaint, they must be considered as redundant. They can not constitute the basis for an injunction. It must appear by the facts stated in the complaint, that an injunction is a remedy appropriate to the character and object of the action.

The mode of obtaining an injunction is by affidavit (§ 220). The Code does not contemplate a detailed statement of the grounds for an injunction in the complaint.

A complaint when duly verified can not be treated as an affidavit for the purpose of an application for an injunction. (*This decision is adverse to that in Rooms agt. Webb, 3 How. Pr. R. 327; Krom agt. Hogan, 4 id. 225, and Schoonmaker agt. Dutch Church, Kingston, ante page 265*).

At Chambers, Buffalo, Dec. 1850. The defendant V. R. Cary, made a general assignment of his property to the other defendants, who are his sons, for the benefit of his creditors. The plaintiff is a judgment creditor of V. R. Cary. His judgment was recovered upon an indebtedness which was contracted, and due before the assignment was made.

The object of this suit is to set aside the assignment, on the ground that it was made to hinder and delay creditors in the collection of their debts. The complaint also alleges that the assignees are pecuniarily irresponsible, and prays for the appointment of a receiver on this ground. The complaint is drawn like a bill in chancery, containing in addition to the allegation of facts above stated, a detail of circumstances, confessions of the

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defendants, &c. &c. constituting evidence, to establish the main charges of fraud, and insolvency of the assignees. It is verified in the form prescribed by the 157th section of the Code. Upon the complaint and the affidavits of verification, Mr. Houghton, the plaintiff's counsel applies for an injunction restraining the assignees from interfering with the property until the further order of the court.

SLL, Justice.—The plaintiff has in this case adopted the mode of pleading, which was used in the Court of Chancery. The facts, which if established, entitle him to an injunction, are, the fraudulent intent, in making the assignment, and the insolvency of the assignees. These facts the plaintiff could not swear to positively, and he has, therefore stated circumstances and evidence in detail, which he claims prove *prima facie*, the main charges in the case.

The question first presented is whether this mode of pleading is now admissible. The Code directs that the complaint shall contain "a statement of the *facts* constituting the cause of action" (*sec. 142, sub 2*).

This provision has, I believe, been uniformly construed, to exclude a detailed statement of the evidence, and to confine the pleader to a statement of the *facts only* upon which his right to relief depends (*Glenny agt. Hitchins, 4 How. Pr. R. 99; Shaw vs. Jayne, id. 119; Knowles vs. Gee, id. 317; Russell vs. Clapp, id. 347; McMurray vs. Gifford, 5 id. 14; Nefus vs. Kloppenburgh, 2 Code Rep. 76*).

It is said, however, that these decisions were all made in common law actions, and that the method of pleadings, pursued in this case is still allowable, where equitable relief is demanded.

I am satisfied that there are actions of legal and of equitable cognizance, between which, as heretofore, the constitution and laws recognize a distinction. But, one uniform system of pleading and practice, is made applicable to both classes, which are now included in the common denomination of "*civil actions*" (*Code, § 69*). The Code abolishes all forms of pleading inconsistent with its provisions, and declares that the sufficiency of

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pleadings shall hereafter be determined by the rules which it prescribes (§ 149).

One of the evils charged to the former judicial system of this state, was, the alleged inability to determine in what forum to apply for redress. It was said that parties frequently applied to courts of law for relief, when, as they afterwards found, their cases belonged to a court of equity, and *vice versa*. It was even claimed that some were denied a hearing altogether; the courts of law and equity declining jurisdiction, each alleging that it appertained to the other. Whether mistakes of this kind were unavoidable, or were frequent enough to furnish any just ground of objection to the system which has been recently superseded, it is not important to inquire. Such a difficulty was claimed to exist and alleged to be a serious mischief, and a remedy for it was sought by the successive action of the constitutional convention and of the legislature. With this view the constitution conferred jurisdiction "*in law and equity*" on one tribunal. But this did not fully obviate the difficulty. It promised to secure ultimately a hearing, on one side of the court or the other; but the pleadings and practice at law being still different from those in equity, the same necessity continued for determining beforehand to which side jurisdiction belonged. The commissioners on practice were therefore instructed to report a system, abolishing these forms, and providing "for a uniform course of proceeding in all cases, whether of *legal or equitable cognizance*" (*Laws of 1847, p. 67, sec. 8*). The Code of Procedure followed these instructions; the 69th section of which is as follows: "The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress or prevention of private wrongs, which shall be denominated a *civil action*."

To allow a mode of pleading in suits of equitable cognizance, different from that required in suits at law, would frustrate the obvious design of this legislation. It would be in conflict with its plain provisions and perpetuate, at least in part, the very mischief at which it was specially aimed.

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The intention of the legislature, manifestly was, to permit a party to state the facts of his case, in his complaint, as they may exist, without imposing upon him the responsibility of determining in advance, whether relief should be administered to him according to the rules of legal or equitable jurisprudence. The court pronounce such judgment as the facts which are stated and proved, require, whether it be legal or equitable. If the different modes of pleading remain, as is contended, it is now as important as ever to determine beforehand, to which class the action belongs, and a mistake on this point must produce the same mischief which the framers of the constitution, and the legislature, have tried to prevent.

Except to obtain a discovery no necessity ever existed for detailing the evidence even in a bill in chancery. It was useful only to enable a complainant to examine his adversary as a witness. When this was not required it was only necessary, as now, to state the *facts*. A detail of the evidence did not aid the prosecution, nor did its omission limit the scope of the testimony or affect the remedy.

The examination of a defendant by bill of discovery is now done away, and with it all occasion for resorting to the peculiar mode of pleading to which it gave rise. The granting of judicial relief must always be preceded by an ascertainment of the facts, upon which the right to it depends. It is the office of pleadings, to present the *facts*, as they are claimed by the parties respectively to exist, and I have not been able to conceive, why the facts should be accompanied by a statement of the evidence, where equitable relief is demanded, and such statement be omitted when the application is for a judgment at law. There seems to be no authority in law or reason for continuing in this state a distinction between the pleadings in actions at law, and those in suits in equity.

It follows that the matters stated as evidence in this complaint, are redundant and it would be the duty of the court, upon a proper application, to strike them out. It is upon these matters, as we have seen, that this application is founded; but redundancy

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and surplusage do not constitute a legitimate basis for any relief, *provisional* or otherwise, in behalf of the party introducing them. To entitle the plaintiff to an injunction, it must appear by his complaint that the relief demanded or some part of it, consists in restraining the commission or continuance of some act; the commission or continuance of which during the litigation will produce injury to the plaintiff, &c. (*Code*, §219) In other words, it must appear by the facts stated in the complaint, that an injunction is a remedy appropriate to the character and object of the action. But the mode of obtaining the injunction is particularly specified as follows: "The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment, upon its appearing satisfactorily to the court or judge *by the affidavit* of the plaintiff, or of any other person, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction" (§220). Thus it will be seen that the grounds for the injunction must be shown by *affidavit*, and that the Code does not contemplate a detailed statement of them in the complaint. Such a statement was not necessary even in a bill in chancery, although it was the common practice when an injunction was desired, and the plaintiff depended on his own oath to obtain it. It was competent under the old equity practice to omit the statement of circumstances and evidence in the bill, and to supply them by affidavit; such was the common mode when the oath of a person other than the complainant was required to obtain the writ.

To do away altogether with the occasion of resorting to the old equity mode of pleading, the commissioners on practice recommended the abolition of the bill of discovery and the substitution of another method of examining the defendant (*Com's first Rep.* 75, 76-244, 5, 6). This recommendation was followed by the legislature (*Code*, 389 to 397), and it would be strange, indeed, if it was designed to tolerate, unnecessarily, the objectionable system still, for the purpose of obtaining an injunction. Such a conclusion is especially inadmissible, when we find another, plain, simple, and consistent method, expressly provided for obtaining this remedy.

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The remaining point is, that the complaint when verified, as this is, may be treated as an affidavit for the purposes of this application. The terms "pleading" and "affidavit" have never been understood as synonymous. The Code has not confounded their meaning, or abolished their use, or given them any new definition. I do not feel at liberty to substitute a *pleading*, as the foundation of an order when the law has expressly required an affidavit. The propriety of pursuing the practice which the statute, in plain language enjoins, does not seem to me to be a question open for judicial consideration.

I am aware that it is assumed in *Roome vs. Webb* (3 *How. Pr. Rep.* 327), and *Krom vs. Hogan* (4 *id.* 225), that the complaint may, when positively verified, constitute a sufficient ground for an injunction. The well considered opinions of the learned judge who decided those cases, are certainly not to be disregarded. But it does not appear that the point here presented, was raised by counsel in either of the cases cited, or particularly examined by the judge, or even that those complaints were objectionable in the particular mentioned. In both, injunctions had been previously obtained. The question presented and decided, in the first was, that an answer verified upon information and belief only, could not be read upon a motion to dissolve an injunction. What was said about using pleadings as affidavits, was incidental to the other question, and not indispensable to its decision. In the other case the defendant was in contempt for violating the injunction, and it was decided that a motion to dissolve it could not be heard until the contempt was purged. The motion passed off on this preliminary question. Still some remarks were made by the judge on the merits, the scope of which embraced the point now under consideration, although they referred more directly and particularly to the manner of verifying facts to be presented on such a motion.

My conclusion is that the injunction should not be allowed on this complaint. The proper mode of proceeding is, to draw the complaint as in other cases, stating facts only, and omitting evidence and legal conclusions. The additional circumstances and

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evidence, which may be needed to obtain an order of injunction, should be presented by *affidavit*. The order is denied, but the plaintiff is at liberty to make another application upon papers prepared as here indicated.

5 How. 278—APPLIED, 56 How. 172; s. c. 8 Daly
9.

SUPREME COURT.

Fox, Adm'r of the estate of Fox, deceased, agt. GOULD.

In awarding an extra allowance of costs under § 308 of the Code, the court should *discriminate* in litigated actions, between "difficult and extraordinary" as contradistinguished from "common and ordinary." Each case must be determined according to its peculiar circumstances, no general rule can be adopted. (*The opinion in Dyckman agt. McDonald, ante page 121, not concurred in*).

Jefferson Special Term, January 1851. This was an action commenced to recover \$1000, money alleged to have belonged to Isabel Fox, deceased, wife of the plaintiff, in her life time, and to have been her separate property, held by the defendant as her trustee. The cause was referred at the last December circuit upon the motion of the plaintiff, without previous notice, the defendant appearing prepared for trial. The defendant noticed the cause for trial before the referee, attended prepared, but the referee failed to appear. The parties then stipulated to try, on a given day, at which time the plaintiff proved his case as stated in the complaint. The defendant then proved, that before the death of said Isabel, and while she lived separate from her husband, she made a transfer to the defendant of her whole separate property in consideration of her previous indebtedness to him. The defendant also proved a set off, to a large amount against the said Isabel, whereupon the plaintiff's attorney, after the trial had been in progress *nearly two days*, served a notice of the discontinuance of the action. The defendant now moves for an extra allowance of costs, provided for by section 308 of the Code, on the ground that the action fell within the class of cases "difficult or extraordinary."

JOHN CLARKE, *for Defendant.*

JAMES F. STARBUCK, *for Plaintiff.*

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HUBBARD, Justice.—The term “difficult or extraordinary,” seems to be used in contradistinction to “common or ordinary,” hence the court is required to *discriminate*, in litigated actions, in awarding an extra allowance of costs. My view of section 308 of the Code, does not correspond with the decision in the case of *Dyckman vs. McDonald* (5 *Howard*, 121). It seems to me that the legislature could not have intended to empower the court to allow a percentage in all *litigated trials*; such may have been the intention of the commissioners, but that intent was frustrated by the legislature inserting in the section reported, the words “difficult or extraordinary.” The section as it came from the hands of the commissioners, extended a discretionary allowance to all cases of trial, regardless of the nature or character of the action; but the section as passed into a law, plainly, imposes the duty of discrimination, and the per centage to be allowed only in cases distinguished from the mass of actions, as “difficult or extraordinary.” Each case must be determined according to its own peculiar circumstances, no general rule can be established, and diversity of opinion must prevail, because each judge must be guided by his individual experience, as to what actions and trials are “difficult or extraordinary,” within the statute. All litigated trials can not be considered “difficult,” within the meaning of the section, because such a construction would completely nullify the words “difficult or extraordinary,” as used, and contravene the plain intent of the legislature, as before observed. Effect can be given to these words, in connection and consistent with the rest of the section, and can not, therefore, be disregarded. It seems to me that the word “difficult” should be applied to questions of law involved in the action. “Extraordinary” may apply to any other feature or circumstance, distinguishing the base from ordinary litigations.

The case before me does not fall within the principle of section 308. The legal questions were not difficult, nor does it appear from the affidavits upon which the motion is made, that the circumstances connected with the trial were “extraordinary.” It was an ordinary case of reference. There was nothing unusual

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in the manner of the reference, or the trial before the referee. The time consumed was not extraordinary. It was conceded upon the argument that the suit had been fairly prosecuted, and when *time alone*, is relied upon, it should clearly appear that more than ordinary was necessarily consumed, for there is another portion of section 308 which provides for cases where the trial has been unreasonably protracted by the design of the party or attorney. In a doubtful case, the extra costs should be withheld. In all cases where the trial has been by reference, the certificate of the referee should be procured. The affidavits of the parties are generally so conflicting, that such certificate would materially aid in arriving at a just conclusion, in motions like this. The motion must be denied.

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SUPREME COURT.

HOLLENBECK agt. VAN VALKENBURGH AND OTHERS.

The general rule adopted by the Code of Procedure makes all persons competent witnesses, notwithstanding their interest in the event of the action.

The exceptions to this rule are, a party to the action, any person for whose immediate benefit it is prosecuted or defended, and an assignee of a thing in action, assigned for the purpose of making him a witness. These may still be disqualified by reason of interest.

This exception extends to an adverse party called as a witness, as well as to a party offered as a witness in his own behalf.

A party, incompetent to testify, may still give evidence of the loss of an instrument, as a foundation for the introduction of parol proof of its contents; and in so doing, may speak of facts and circumstances sufficient to identify the instrument, or describe it, so as to show whether the paper lost was the one in question.

On the execution of a will, where the witnesses are requested, in the presence of the testator, by some one appearing to act in his behalf, to sign their names as witnesses, it is equivalent to a request made by the testator himself; or at least it is a question to be submitted to a jury, whether in such case the facts do not show a request made by the testator himself.

A will is not void, because the person who signed the testator's name to the will, by his direction, neglected to write his own name as a witness to the will.

The only consequence of such an omission is a forfeiture of fifty dollars, to be paid by the person in default, to any person interested in the property devised, who will sue for the same.

Albany General Term, Feb. 1850. Present Justices WATSON, PARKER and WRIGHT. This was a bill filed in June 1848, for the purpose of proving a lost will. The complaint alleged that Johannes Hollenbeck died on the 18th of March 1848, seized of real and personal estate. That on the 13th December 1831, he procured Doctor Benham to draw his will and execute it in due form to pass real and personal property, in the presence of Jacob C. Van Hoesen and John C. Van Hoesen, and that the will was enclosed in a wrapper and left with Doct. Benham for safe keeping. That on the 10th April 1848, the plaintiff, being the widow of the deceased, procured the said will from the family of Doctor B. (who had died in 1834); that on the 11th April 1848, the plaintiff caused the will to be read in the presence of those interested

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in the estate and had a copy of it made by Richard Van Valkenburgh; that a few days afterwards she showed the will to Messrs. Hogeboom and Collier, counsellors at law, and was proceeding under their advice to have the will proved before the surrogate of Greene county; that before the citations were returnable; and on the 17th April, she put the will into a trunk where her husband had kept his valuable papers and locked the trunk; and that on the 23d of April she discovered the trunk had been opened and the will taken away, and that she had since been unable to find the same. Three of the defendants, Johannes Hollenbeck and wife, and Edward Hollenbeck, put in an answer denying all these allegations. The infant defendants put in general answers. The bill was taken as confessed by Richard Van Valkenburgh and wife, and Henry J. B. Tolley.

By the alleged will, the testator gave to Caspar Hollenbeck, his son by a former marriage, five acres of woodland during his life, which; after the death of Caspar, went to Johannes and Catherine, children of Caspar.

He then gave all the residue of his property, real and personal, to the plaintiff for life, and after her death to his daughters Catherine and Phebe Ann. The plaintiff was to pay the debts. Catherine married Richard Van Valkenburgh; Phebe Ann married Henry J. B. Tolley and died in July 1848, leaving three infant children. Caspar died in 1840, leaving a widow and the following named children, viz: Johannes Hollenbeck, Catherine, wife of Charles Champlin, Edward Hollenbeck and Sarah Elizabeth Hollenbeck, an infant.

The cause was referred to Caleb Day, Esq. for hearing and decision, and the referee reported in favor of establishing the will. The defendants moved to set aside the report on the merits, and the cause was ordered to be heard at a general term.

H. HOGEBOOM, for Plaintiff.

K. MILLER, for Defendants.

By the Court, PARKER, J.—This cause was commenced in equity before the Code took effect, and was tried before the re-

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referee on the 22d day of February 1849. It is, therefore, to be governed by the Code of 1848, so far as that act was made applicable to existing suits (*Session Laws of 1848, p. 567*).

I. On the trial, the plaintiff called as witnesses two of the defendants, viz, Richard Van Valkenburgh and Henry J. B. Tolley. They were objected to by the other defendants, on the ground of their interest in favor of the plaintiff. The objection was overruled and their testimony received. It is now urged that the exception to the admission of such testimony was well taken.

This evidence was admitted by the referee, under § 344 of the Code of 1848, which provided that a party to an action might be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties. Section 351 enacted that no person, offered as a witness, should be excluded by reason of his interest in the event of the action. And section 352 declared that the last section should not apply to a party to the action, nor to any person for whose immediate benefit it was prosecuted or defended, nor to any assignee of a thing in an action, assigned for the purpose of making him a witness. The meaning of this seems plainly to be that a party to the action, &c. may be disqualified on the ground of interest. As to them, the law remains as it formerly existed, and their competency depends upon their having no interest in the event of the action.

It is important to ascertain whether this exception to the general rule laid down in the statute on the subject of interest, extends to an *adverse* party called as a witness. This is a question that has been somewhat discussed among the profession, but I am not aware that it has been decided in any reported case. The question will no doubt be frequently presented, as the same language employed on this subject in the Code of 1848, was reenacted in the Code of 1849, and is still in force.

It is claimed that it was the intention of the framers of the Code, to provide only that a party should not be a witness in his own behalf. There may perhaps be some ground for such an inference, from the provisions of the other clause of the section; but there is certainly no such restriction made. When they say

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this section shall not apply to a party to the action, it means *any* party to the action; as well the party offering the evidence, as the adverse party when called as a witness; and there seems to be good reason for such a construction. Without it, it would be impossible to prevent a party being a witness in his own behalf, by collusion. The former chancery practice is now adopted as to making parties. If a person having a common interest with the plaintiff, a joint contractor, for instance, refuses to join in bringing the action, he is to be made a defendant (*Code*, § 119). And if he may then be examined as a witness on the call of the plaintiff, regardless of his interest, he may give evidence in his own cause, and for his own benefit, which he could not have done, if he had occupied his proper position as a plaintiff. Collusion could not be prevented under such a construction of the statute. I think the disqualification on the ground of interest applies therefore as well to the adverse party, as to the party offering his testimony in his own behalf.

It is necessary to examine, in the next place, whether these defendants, or either of them, had any interest in favor of the plaintiff. Every person is competent to be sworn as a witness, unless his disqualification is affirmatively shown; and the burthen of proof rests on the party making the objection. Whether the witnesses objected to in this case were interested, depended on the fact whether they would take more of the property of the decedent under the will, than would fall to them as heirs at law. No evidence was offered on this point, nor were the witnesses themselves examined on their *voir dire*. The defendants objected that the interest of the witnesses was identical with that of the plaintiff, and evidently depended upon the language of the alleged will to support the objection. But I think an examination of the provisions of the will by no means satisfactory on this question of interest. There seems to have been but little personal property; it is stated in the bill to have been about \$300; whether more or less than enough to pay the debts, does not appear, nor was it perhaps material to inquire. The property was principally real estate. Five acres only were given to Caspar and his chil-

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dren. The probability is that this was worth much less than the one-third, subject to the widow's dower, which he would have received as heir at law. But this inferred principally from the fact of the opposition made to proof of the will, and from the small number of acres devised to Caspar. There is no proof whatever either of the value of the five acres devised, or of the share Caspar would have taken as heir at law. But conceding that the five acres were worth less than Caspar's share, as heir, there are still greater difficulties in showing these witnesses interested. The widow would have been entitled at law only to her dower, that is to say, to the use of one-third of the real estate during her life. The will gave her a life estate in the whole property. She was therefore largely interested in establishing the will. The remainder was devised to the wives of these two witnesses, to be equally divided between them. At law these witnesses, in right of their wives, would have entered with Caspar into immediate possession of the property, subject only to the widow's dower. Now, whether the immediate possession of one-third, subject to dower, is worth more or less than one-half, after the death of the widow, is a question undetermined by the evidence. Nor can it be ascertained by computation except on proof of the widow's age and the value of the property. I think, therefore, there was no evidence before the referee that would have warranted him in deciding the witnesses to be interested in favor of establishing the will.

II. It is also objected that the referee erred in admitting the plaintiff to be examined and to testify to any facts except the bare loss of the instrument. The testimony of the plaintiff was only admissible to prove the loss of the will (*Woodworth vs. Barber*, 1 *Hill*, 172; 2 *R. S.* 406; 2 *Cow. & Hill's Notes*, 1218; 1 *id.* 138; *Jackson vs. Betts*, 6 *Cow.* 290; *Blade vs. Noland*, 12 *Wend.* 173). It was necessary she should identify the instrument, or describe it, so as to show whether the paper lost was the one in question; beyond this, she had no right to go. There are some facts mentioned in her statement unnecessary for the purpose of identity, and inadmissible as evidence. But it must be remembered her testimony was addressed to the referee for

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his consideration, only for the purpose of introducing secondary evidence of the contents of the will; and the referee reports that he decided the evidence improper and that he would not consider it or take it into account, except so far as it went to show the loss of the instrument. I see no good ground of exception to the course taken by the referee on this point; and I think the evidence of the loss of the will entirely satisfactory.

III. The evidence of the execution of the will was sufficient. It was shewn that the testator duly acknowledged it as his last will and testament in the presence of the witnesses, and that the witnesses signed their names at the request of Doctor Benham, who appeared to be acting in behalf of the testator, such request being made in the presence of the testator. This was equivalent to a request made by the testator himself, as was decided by this court in *Doe vs. Roe* (2 *Barb. S. C. Rep.*, 200); and in *Rutherford vs. Rutherford* (1 *Denio*, 33) it was held sufficient evidence to be submitted to a jury upon the question whether there was a request or not.

The defendants' counsel cited and relied upon *Hudson vs. Parker* (8 *Lond. Jurist*, 786). There, two persons present at the same time, subscribed a paper at the request and in the presence of a party, who told them it was his will. They did not see him sign it, nor did he acknowledge any signature, the writing on the paper being concealed from them. It was held that the statute had not been complied with. The same point was decided in *Scott vs. George* (3 *Curteis Ex. R.* 160). These decisions were made under the English statute concerning wills (1 *Vic. Ch.* 26, § 9), which requires that a will, "shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest or subscribe the will in the presence of the testator." It will be seen that this statute is in most of its features like our own, which requires in addition, that the testator shall declare the instrument to be his last will and testament, and that the witnesses shall

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sign at the request of the testator. But I think the English cases cited unlike the one now under consideration. There, the testator did not acknowledge the execution of the will, and the writing on the paper was concealed from the witnesses. Here, the will was exhibited; there was no concealment, and the testator not only acknowledged its execution but in accordance with the additional requirement of our statute declared it to be his last will and testament.

The testator did not subscribe his name to the will. The name accompanying his mark was probably written by the same person who drew the will, and the statute requires that every person who shall sign the testator's name to any will by his direction, shall write his own name as a witness to the will (2 *R. S.*, 3d ed., 124, § 33). A compliance with this requirement was omitted. But the same section provides, that such omission shall not affect the validity of the will. The only consequence of the omission was a forfeiture of fifty dollars, to be paid by the person in default, to any person interested in the property devised, who would sue for the same.

IV. I think the referee was clearly right in coming to the conclusion that the will whose execution was proved by John C. Van Hoesen, was the same will shown to Messrs. Hogeboom and Collier, and of which a copy was taken by Richard Van Valkenburgh. This question of identity rested entirely upon circumstances, but they all pointed in one direction. They agree in date—in the names of the testator and witnesses. The will witnessed by John C. Van Hoesen was executed in the presence of Doctor Benham, and in all probability drawn by him. The will produced to Mr. Van Valkenburgh and copied by him, seventeen years afterwards, was found among the papers of Doct. Benham—purported and appeared to be an original paper, was enclosed in a wrapper, with seals unbroken, and was endorsed "The last will and testament of Johannes Hallenbeck," in the handwriting of Doctor Benham. It bore the appearance and had the marks of antiquity of a will executed in 1831. No other instrument is produced and no other is pretended to have been seen or heard

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of John C. Van Hoesen, whose name appears as a witness to the will sought to be proved, witnessed but one will.

Under these circumstances, considering the lapse of time and the death of most of those persons who could have had any knowledge of the transaction, I think the evidence left no reasonable doubt of the identity of the instrument; and that point being settled, it followed there was the most satisfactory evidence of the contents of the will, in the sworn copy made by Mr. Van Valkenburgh and in the recollections of the other witnesses.

There must therefore, be a decree in accordance with the report of the referee, which is hereby affirmed. The costs of all parties previous to the appeal must be paid out of the estate. The costs on the appeal are also to be paid out of the estate, except that Johannes Hollenbeck and wife, and Edward Hollenbeck must pay their own costs on the appeal.

5 How. 288—See 8 How. 78.

SUPREME COURT.

WHEELER agt. CROPSY.

The horse of a country physician, whose patients reside at too great a distance to visit them on foot, is a "necessary team," and as such is exempt from execution, under the exemption act of 1842.

In determining whether the team is *necessary*, it is entirely immaterial whether the debtor has or has not other means to pay the debt. The exemption does not depend upon the pecuniary ability of the debtor.

The law was intended for the benefit of all persons, no matter what their calling or profession, whose team is necessary to the successful or convenient prosecution of their business.

If the creditor claims the right to seize the property, on the ground that the debt for which the judgment was recovered, accrued before the passing of the act, it rests upon the creditor to show the facts that will take the case out of the exemption.

Where part of the debt accrued before, and part after, the passing of the act, and there has been a payment made, the law applies such payment to the first accruing indebtedness.

In the absence of proof of an express contract, a promise to pay will not be implied till the services have been performed.

Albany General Term, Feb. 1850. Present, Justices WATSON,

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PARKER and WRIGHT. Wheeler sued Cropsey before a justice of the peace in the city of Troy, in trespass for taking a horse. The defendant justified the taking under an execution against Wheeler. The justice gave judgment for the plaintiff and the defendant appealed and the cause was tried in the Troy Mayor's Court in 1847. It appeared on the trial that Wheeler was a householder and had a family for which he provided, residing with him in the town of Brunswick, Rensselaer county; that he was a physician engaged in the practice of his profession, and that his ride extended from three to ten miles from his residence. That he had been the owner of the horse in question six or seven years and used it in visiting his patients and owned no other horse. That in March 1844 the horse was levied on and sold by Cropsey, as a constable, under an execution in favor of Henry McCann against Wheeler. The execution was issued on a judgment recovered on 17th February 1844, for about \$27 for the services of McCann's wife in the family of Wheeler. It appeared that she commenced working for Wheeler about 1st March 1842, and continued in his service over a year. It did not appear that she had worked under any express contract; but it did appear that on the trial between McCann and Wheeler, the jury allowed the defendant about \$10, money he had paid towards her services. The horse was proved to be worth from \$40 to \$60.

The Recorder charged that it was the intention of the legislature to extend the benefits of the exemption act, passed April 11, 1842, to teamsters and laborers and not to professional men, and that the horse in question was not exempt under that act, to which the counsel for Wheeler excepted.

The Recorder also charged that inasmuch as Mrs. McCann commenced work before the passage of the act, and Wheeler had not shown a contract made after the passage of that act, there was proof of a contract made before the passage of the act, and that the levy and sale were therefore warranted by law even if the horse had been a necessary team within the meaning of the act; to all of which the counsel for Wheeler also excepted.

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The counsel for Wheeler requested the Recorder to charge that the said horse was exempt from execution.

That for the purpose of determining whether the judgment in favor of McCann against Wheeler was for an indebtedness accruing before the passage of the act, the jury had a right to consider the set off as applied to the payment of the first wages accruing unless it was affirmatively shown that it was not so applied.

That to avail himself of the defence, Cropsey was bound to show affirmatively and positively that the judgment was for a debt which accrued before the passage of the act, or that it was for services rendered under an express contract made before its passage. That, as the facts appeared, the recovery by McCann against Wheeler could only have been had on an implied promise to pay for the services and that the law did not imply a promise until after the rendition of the services. The Recorder refused to charge as requested on the several propositions submitted and the counsel for Wheeler excepted.

The Recorder then directed a verdict in favor of Cropsey, and the counsel for Wheeler excepted and brought a writ of error.

H. Z. HAYNER, *for Plaintiff in Error.*

J. NEIL, *for Defendant in Error.*

By the Court, PARKER, J.—The act in question, passed April 11, 1842, in addition to the articles previously exempt from sale under execution, exempted “necessary household furniture, and working tools and team, owned by any person being a householder, or having a family for which he provides, to the value of not exceeding one hundred and fifty dollars.” The first question presented is, whether this exemption of a team extends to the only horse of a physician engaged in a country practice of several miles in extent, where the horse is in daily use in visiting his patients. If we come to the conclusion that the horse was not within the exemption, it will not be necessary to examine the other questions discussed on the argument. But if the horse was exempt under the act of 1842, we must go further, and see whether

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the debt of McCann was contracted before the passage of that act; for it seems now to be settled that that act does not affect debts contracted before its passage (*Quackenboss vs. Danks*, 1 *Denio*, 128; 3 *id.* 594; *Matthewson vs. Weller*, *id.* 52; 1 *Comst. R.* 129). Though against the inclinations of our own judgments, we so held, in accordance with these decisions, in *Vedder vs. Aldenbrach*, decided March 1848.

I see nothing in the language of the statute designed to limit the exemption, of a necessary team, to teamsters and laborers; on the contrary the exemption is expressly given to *any* person being a householder or having a family for which he provides. Wheeler was within this description, and the question is therefore, was it a *necessary* team? That is to say, was it necessary to the carrying on of his business—to the exercise of his means of obtaining a livelihood? That was a question of fact, that I think should have been submitted to the jury. If it was his only team, and if it was required for the successful or convenient prosecution of his professional business, then, I think it was a *necessary* team, within the meaning of the act. I see no reason why a country physician, whose patients reside at too great a distance to visit them on foot, or any other professional man whose business requires the use of a team, is not protected in the exemption, as well as a teamster or laborer. The restricted application given to the exemption in the court below, would exclude small farmers, as well as others, from the benefit of the law. I think no such limitation was contemplated. The policy of the law was broad and liberal. It favors no invidious distinctions. It was intended for the benefit of all persons, no matter what their calling or profession, whose property comes within the scope of its provisions.

In determining whether the team was *necessary*, it is entirely immaterial whether the debtor had or had not other ample means to pay the debt. If the fact that Wheeler had money enough to pay the debt is to control this question, then a teamster's horses and a mechanic's working tools are not to be exempt if the owner has money enough in his pocket to pay the judgment. This can

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not be the test. I think the team of every teamster and of every other man where it is necessary to his use, is exempt, although the owner may be worth thousands of dollars in money or in other property. The exemption is not made by the statute to depend on the pecuniary ability of the debtor. Where the debtor has money or other property, the law has provided ample remedies for collection, without resorting to exempted property for the satisfaction of the debt.

The jury were therefore at liberty to find the horse within the exemption, and that he was not liable to execution, unless the debt for which the judgment was recovered, accrued before the passing of the act. It rested on Cropsey to show this affirmatively to justify his levy and sale.

I find nothing in the evidence indicating that all the services were rendered under one contract, and that that contract was made before the passage of the act. The evidence shows nothing but the rendering of the services. A hiring is of course implied, but it may be a hiring from week to week. In the absence of proof of an express contract, a promise to pay is not implied until the services have been performed. There was nothing to prevent McCann suing for the services at the end of every week, and he had no right, by including in one suit, the services rendered both before and after the passage of the act, to have the debt, accruing afterwards paid out of the property which the statute exempts.

But the evidence shows that in the suit between McCann and Wheeler a credit was proved and allowed to an amount greater than the indebtedness which accrued before the passage of the act. I think the law applies such payment to the first accruing indebtedness. No part of the judgment recovered by McCann was therefore for services rendered before the passage of the exemption act.

The peculiar character of the demand against Wheeler; his professional calling and the strong moral and legal obligation resting on him to pay the debt, are well calculated to excite our sympathies and mislead our judgments. But the law must not

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bend to the hardship of a particular case. Such a misapplication would distort the beauty of its proportions and impair its value. The law can only operate justly when it operates equally.

I think the judgment of the Mayor's Court should be reversed with costs and a venire de novo awarded.

5 How. 298—NOT CONCURRED IN, 5 How. 468; 6 Id. 89, 92. *Contra*, 7 Id. 17.

SUPREME COURT.

5 How. 298—RECOGNIZED AND DISTINGUISHED, 63 How. 164.

CURE agt. CRAWFORD.

The provision of the Revised Statutes (2 R. S. 516, § 47), which enacts that the proceedings to remove a tenant, shall not be *stayed* or *suspended* by any writ or order of any court or officer, is inconsistent with the provision of the Code (§ 219), which authorizes an injunction in any case where the act complained of would "produce injury to the plaintiff," and is therefore repealed (§ 468).

The only inquiry now to be made on an application for an injunction is whether the act complained of will "produce injury to the plaintiff." Hence, the duty of the Court is to ascertain whether the act which is sought to be restrained is lawful or not.

Where a landlord had instituted summary proceedings to remove a tenant on the allegation of holding over, and it appeared that the lease had been for one year with the privilege of extending it, at the tenant's option, three more, and after the commencement of the third year (the rent for the two previous years having been paid), without any notice to quit, the proceedings were commenced by summons served at the tenant's house in his absence, at 12 at noon, returnable before an alderman at 1 p. m., at a distance of 8 miles. *Held* that the time and distance of the service and return of the summons, would be tantamount to rendering judgment against the tenant without serving any summons whatever. Besides, the proceedings of the landlord were clearly illegal, for the reason that they were against the tenant as a tenant from year to year, when by the landlord's own showing he was a tenant at will, or his term had not expired. Injunction against landlord's proceedings sustained.

New York Special Term, July 1850. Motion to dissolve an injunction. Crawford, as landlord, had instituted summary proceedings to remove Cure, his tenant, from certain premises, which it was alleged he held over after the expiration of his term. The plaintiff filed his complaint to stay those proceedings. It appeared that the lease had been for one year with the privilege of extend-

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ing it, at the tenant's option, three more. At the end of the first year, the tenant had continued in possession and had paid his rent for the second year. After the commencement of the third year, without any notice to quit, the landlord had instituted his proceedings. The summons was served at the tenant's house during his absence, at 12 o'clock, returnable before an alderman at one o'clock, at a distance of eight miles.

Mr. BUSTEED, for plaintiff, moved to dissolve the injunction on the strength of *Smith vs. Moffat* (1 *Barb. S. C. R.* 65).

N. B. BLUNT, *Contra*.

EDMONDS, Justice.—The only question which it is necessary for me to consider in this case is whether the Code has made any alteration in the law which would formerly have governed it.

My confidence in the correctness of the opinion expressed in *Smith vs. Moffat* (1 *Barb. Sup. C. R.* 65), has been unshaken by any thing which has been urged on this argument, but whether a new state of the law governing the case, has not arisen under the Code, is another question.

Before the Code it was a well established rule that an injunction would not issue to restrain a trespass, unless it would work an irreparable injury, or a destruction of the freehold for the uses to which it was devoted or to prevent a multiplicity of suits (*Hart vs. Mayor of Albany*, 9 *Wend.* 570; *Livingston vs. Livingston*, 6 *John. C. R.* 497; *Jerome vs. Ross*, 7 *id.* 315).

But now, by section 219 of the Code, an injunction may issue wherever the commission of the act complained of, during litigation would "produce injury to the plaintiff." In this respect the Code of 1849 differs materially from that of 1848. In the latter the provision was that an injunction might issue to restrain the commission or continuance of an act, the commission or continuance of which would produce great or irreparable injury to the plaintiff (*Code of 1848*, § 192; *Code of 1849*, § 219).

This enactment very greatly enlarges the power of the course in the use of a preliminary injunction and removes the inquiry which formerly was always made, namely, whether the injury was

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irreparable in its character or would destroy the freehold. Now it is enough to warrant the issuing of an injunction to show that any injury would be produced to the plaintiff.

But this is not all the change in the law which this provision of the Code has wrought. Its language is very unequivocal and plainly reaches the case now before me, for the simple reason that the provision of the Revised Statutes (2 R. S. 516, § 47), which enacts that the proceedings to remove a tenant shall not be stayed or suspended by any writ or order of any court or officer is plainly inconsistent with the provision of the Code which authorizes an injunction in any case where the act complained of would produce any injury to the plaintiff, and by section 468 of the Code all statutory provisions inconsistent with that act are repealed.

So that henceforth on an application for an injunction, the inquiry is not to be, as formerly, whether the act complained of would work an irreparable injury or the destruction of the freehold, or whether it proceeded from an attempt to remove a tenant holding over, but simply whether it would produce injury to the plaintiff.

If the act is clearly right and proper it could not properly be said to produce injury to the plaintiff, but to be the removal or prevention of an injury which he was producing to the other side. And hence the inquiry and the only one, it appears to me, which under the Code can be made, is whether the act which is sought to be restrained is lawful or not.

This is very extraordinary power to be conferred on any court and it may well be doubted how far it was expedient or necessary to grant it. But that is a question with which we have nothing to do. That is reserved for other and wiser heads.

I must, therefore, inquire in this case whether the defendant's proceedings, which are restrained by the injunction, were according to law; and on this point, it appears to me very clearly that they were not.

I very much doubt whether such a proceeding could be sustained where a summons was served on the tenant, returnable at

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such short time and at such a distance that it would be impracticable for him to appear, and that it would be tantamount to rendering judgment against him without serving any summons whatever. But the plain ground of illegality, as shown by the papers is, that the proceeding against the plaintiff was as a tenant from year to year, whereas, according to the landlord's own showing, he was either a tenant at will or his term had not expired, and the proceedings would inevitably be set aside on certiorari.

Under this state of things and this new condition of the law it is doubtless proper to restrain an act unlawful in itself and which must produce an injury to the plaintiff.

The motion to dissolve the injunction must be denied but without costs; but as it was suggested that the plaintiff was not responsible, he must give a new bond with adequate security.

SUPREME COURT.

SELKIRK agt. WATERS AND FOUR OTHERS.

A defendant may be examined as a witness in behalf of his codefendant, in all cases where a separate judgment may be rendered in favor of his codefendant. He is therefore a competent witness in all joint and several actions, whether on contract, or for a tort.

He is also a competent witness, in an action on a joint contract, to prove any personal defence admitting of a separate judgment in behalf of his codefendant, such as bankruptcy, infancy, &c.

In no case, however, can a party be a witness where he is interested in the event of the action.

The evidence of a defendant in behalf of his codefendant should be excluded as irrelevant, when no separate judgment can be rendered on it in favor of the codefendant, because in such case, no legal effect can be given to such evidence.

Other cases considered in which the evidence of a party is irrelevant.

In all cases where a party is called as a witness for his codefendant, and is not interested in the event of the suit, the objection is more properly to the relevancy or materiality of his evidence, than to his competency.

Albany Circuit, March 1851. This was an action for libel. On the trial Waters was called as a witness in behalf of the

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four other defendants. The witness was objected to as incompetent.

H. G. WHEATON and S. STEVENS, *for Plaintiff*.

J. K. PORTER, *for Defendants*.

PARKER, Justice.—I am aware it has been decided at general term in the fifth judicial district, that in an action against several for a tort, one of the defendants can not be examined as a witness in behalf of his codefendants (*Munson vs. Hagerman*, 5 *How. Pr. R.* 233). I understand, however, that a decision has been made at general term in the sixth judicial district, by which such a witness is held to be competent, but I have not yet seen the opinion of the court, which is said to have been written by Mr. Justice Shankland. I learn also that the construction given by the judges of the fourth district, in their several practice at the circuit, is in favor of the competency of the witness; and such has been my own invariable practice at the circuit, since the adoption of the Code. I can not agree with the very able judge who delivered the opinion in *Munson agt. Hagerman*, that the first clause of the 397th section of the Code was intended only to establish, in all actions, the same practice as to the examination of parties that prevailed in the late Court of Chancery. The language is general. "A party may be examined on behalf of his coplaintiff or a co-defendant." And the next clause, "but the examination, thus taken, shall not be used on behalf of the party examined," seems to imply that there is no such restriction, and that it was therefore deemed necessary to provide for the use to be made of the evidence. I think it was the intention of the legislature to make a party in all cases where there may be several judgments, a competent witness for a coplaintiff or codefendant. The only restriction is that imposed by section 399, which excludes a party as a witness, if interested in the event of the action.

Even in an action upon a joint contract, I think one defendant is a competent witness in behalf of his codefendant, to prove any defence of which his codefendant may avail himself separately, as bankruptcy, infancy, &c.; because, on such a defence, though

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the contract was joint, the codefendant may have judgment in his favor and judgment may be rendered against the defendant called as a witness. The legal consequences would therefore be the same as if the suit were brought on a joint and several contract. But, ordinarily, in a suit on a joint contract, one defendant can not be improved as a witness, because he is called to establish a defence common to both the defendants; that is, to prove facts that constitute an entire defence to the demand, as to both the defendants. Such evidence may be excluded as irrelevant; for on it, the court could not give judgment in favor of both defendants, it being provided by statute, that such examination should not be used on behalf of the party examined; and, on it, the court could not give judgment in favor of the other defendant, because there can not be a several judgment on a joint contract, except where there is a personal defence, as bankruptcy, infancy, &c. I think the Code has not changed the law which requires a joint judgment on a joint contract. It only permits a severance of the parties, "whenever a several judgment may be proper" (*Code*, § 274). It is true, it provides that judgment may be given for or against one or more of several plaintiffs, or defendants. But that is only giving permission to adapt the judgment to the contract, as it shall be found to have been made. If three men are sued as partners, and it turns out that two of them only constituted the firm, judgment may be rendered against two, and in favor of the other defendant. So if the demand on which a recovery is sought, is proved on the trial to be due to but two of three plaintiffs, those two may have judgment, and a judgment may be rendered against the other plaintiff. In neither of these cases, is it any longer necessary to nonsuit the plaintiffs, and put them to the expense and delay of a second action; but the court now has ample power to render judgment according to the contract as ascertained. The practice has been changed and greatly improved, but the legal rights upon the merits remain as agreed upon by the parties. Contracts must be enforced as made. It is only where the law has given a personal discharge from the whole obligation to one of two joint contractors, as in case of

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discharge in bankruptcy, that he ceases to be liable, and the contract remaining, judgment may be taken against the other defendant.

The contract being joint, judgment must be given either against both or in favor of both defendants. The court has no power to make a new contract for the parties, on which to give judgment by making it several as well as joint when the parties made it joint only. In an action, therefore, upon a joint contract, though one defendant is competent to prove any defence peculiar to his codefendant, the court may reject as irrelevant, all other evidence; for no legitimate use can be made of such evidence if it is received. In such a case the objection is to the relevancy of the evidence rather than to the competency of the witness.

But in an action on a joint and several contract, or to recover damages for a tort, where the remedy is always joint and several, I think a defendant is in all cases a competent witness for his codefendant, provided he be not disqualified by reason of interest. Because, in all such cases, judgment may be rendered against the witness and in favor of the other defendant, and the testimony received may thus have a legal application. It is the policy of the law in such cases to give to each defendant the same advantage he would have had, if he had been sued separately, and not to allow a plaintiff, at his option, to exclude witnesses by making them defendants. The legislature acted upon the same policy in 1832, in allowing makers and endorsers of a promissory note, when sued together, to be witnesses for each other.

A defendant must, however, still be excluded if interested in the event of the suit. Generally, this objection will not exist, because his testimony is only to be used in behalf of the other defendants. Yet it may sometimes happen that he will still be interested, for he may be so situated as to gain by a judgment in favor of the other defendants, or to lose by one against them; and if so, unless his interest be removed by release or otherwise, he must be excluded.

It is objected that a defendant, in an action for a tort, can not be a witness for his codefendant, because several damages can

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not be assessed against each defendant; and there being but one assessment of damages, that he is interested in reducing the amount. The answer to this objection is to my mind entirely satisfactory. The witness may prove a full defence in favor of his codefendant. If he is only offered to prove mitigating circumstances in behalf of his codefendant, I think the evidence may be excluded as irrelevant; for there can be but one assessment of damages, and as, in tort all are principals and equally guilty in law, the plaintiff has a right to recover the full amount of damages against all, though one of the defendants may have inflicted much less of it than the witness. That one inflicted less, would therefore be immaterial. The witness would not be interested in proving mitigating circumstances in favor of a codefendant, because it would not be the legal effect of such evidence to lessen the amount of recovery.

And if the witness is offered for the purpose of proving an entire defence for his codefendant and it turns out that the evidence, when received, only goes to excuse in part, the act of the codefendant, the jury should be instructed not to take into consideration such mitigating circumstances, in the assessment of damages. For if a great injury, as in an action for an assault and battery, has been inflicted by several persons, all of whom are sued, the plaintiff is entitled to recover full damages against all though the injury was mainly inflicted by one person and the others acted only in aid of him. Suppose, in such an action, a *prima facie* case was made out by the plaintiff, on which he ought to recover five hundred dollars damages. One of the defendants is then called as a witness for his codefendants, and testifies that he struck the blow which produced the injury, and that the others only stood by and encouraged him in the act. This would constitute no defence in favor of the other defendants and might therefore be excluded. Or, if received, the jury would be instructed that they ought to assess damages for the full extent of the injury against all the defendants, each, in law, being equally liable for the entire injury. If, however, the witness called should prove that he alone did the injury and that the other defendants were

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not present and knew nothing of the transaction, and the jury believe the evidence, they would find a verdict against the witness alone and in favor of the other defendants.

There is certainly a difficulty in some cases, in separating, in our minds, the evidence, so that a part of it shall weigh only against one of the defendants and a part against both; and I have seen that there is great danger that a jury will give to both defendants the benefit of the testimony of the one called as a witness. This objection however goes only to the policy of the law. I have found the same difficulty at the circuit where makers and endorsers are joined in the same suit and one of them is called as a witness for the other. But the second clause of the 297th section, above quoted plainly provides, that where a defendant is called to testify for his codefendant his evidence shall not be taken into consideration in deciding between the plaintiff and the witness; but it is to be received as against the other defendant. Such a discrimination is therefore required by the statute.

I have thus stated what I think is the true construction of the section in question, and have given my reasons for the opinions I entertain. There seems to me to be no great difficulty in giving full effect to this provision of the Code; and amidst the conflicting decisions made at the general terms, I think it is my duty to be governed by my own settled convictions, until the construction shall be settled by the Court of Appeals, or the legislature shall alter the law or pass a declaratory act.

I shall therefore admit Mr. Waters to be sworn in behalf of his codefendants.

NEW-YORK PRACTICE

Cusson agt. Whalon.

SUPREME COURT.

CUSSON agt. WHALON.

If the plaintiff neglect to bring the cause to trial, upon an issue of fact, the defendant may move to dismiss the complaint.

The cause is deemed at issue upon the service of the pleadings joining issue in the cause, notwithstanding the right to amend under § 172 of the Code.

But the plaintiff is not obliged to bring on the cause for trial, until the expiration of a reasonable time to prepare for trial after the time to amend has elapsed, unless the defendant waive his right to amend, by giving notice of trial, or by giving notice that he shall not amend.

As he may notice the cause in the mean time, it seems that ten days after the time to amend has expired, is sufficient.

Where the circuit was held thirty-four days after the reply was served, and no amendment was made, the plaintiff would have been in default, had the reply been served personally, but not where it was served by mail.

But where the cause was removed from a Justice's Court by a plea of title and giving an undertaking, the defendant could not have amended his answer, and the plaintiff was in default for not bringing the cause to trial.

Where the notice was that the defendant would move for judgment, as in case of nonsuit, instead of a dismissal of the complaint, it was held, that the plaintiff had not been misled, and that the notice was substantially the same.

Where the complaint is dismissed for not bringing the cause to trial, the defendant may enter up judgment for his costs.

Essex Special Term, March 1851. Motion by defendant for judgment, as in case of nonsuit for not going to trial. The reply, merely denying that the plaintiff had sufficient knowledge of the matter in the answer to form a belief of its truth, was served by mailing on the 31st December 1850; and the Clinton Circuit (where the venue was laid) was held on the 3d of February 1851. The plaintiff did not notice the cause for trial, and now insisted that the defendant had time to amend his answer, which did not expire until too late for that circuit. That as the plaintiff's attorney lived in Chateaugay in the county of Franklin, and the defendant's attorney in Keeseville in Essex, even if twenty days only were allowed to amend, after the 20th of January, the plaintiff had not time to give notice of trial by mail, nor could, without more than ordinary diligence, serve it in season personally. He also insisted that a motion to dismiss the complaint, for not

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going to trial, could not now be made; nor a motion for judgment as in case of nonsuit.

S. AMES, *for the Motion.*

A. POND, *Contra.*

HAND, Justice.—No doubt, where both parties were actors, as in an action of replevin, no motion for judgment as in case of nonsuit, would be entertained, before the Revised Statutes (2 *Tidd's Pr.*, 703; *Forrester vs. Barrett, Coleman's Pr. Ca.*, 92, *S. C.* 1 *J. C.* 247. And see *Rogers vs. Tiff.* 17 *J. R.* 267). By the Revised Statutes, where neither party noticed the cause in replevin, the defendant might move (2 *R. S.* 530, § 46. And see *Potter vs. Babcock, id. in notes*). By § 258 of the Code, either party may notice the cause for trial. It would have been more analagous to the old practice, to have considered this as abolishing the right to move for judgment as in case of nonsuit, or for dismissal of the complaint for not trying the cause, as no such right is given to defendant by the Code, or at least in such direct terms, as was by the Revised Statutes in case of replevin. But the Supreme Court has, by rule, adopted a different construction. Rule 23, expressly authorizes a motion to dismiss the complaint, with costs, for the neglect of the plaintiff to bring the cause to trial. And perhaps this is better than to put parties to the trouble and expense of the defendant attending prepared for trial, when all he asks is to terminate the cause, *Lee vs. Brush*, cited by the plaintiff's counsel, of which a very brief note is found in 3 *Code R.* 165, was probably an issue of law. It is enough, however, that the rule does not conflict with any statute and is the act of the whole court, which always had power to change its own practice, when that can be done without violating a statute. When prescribed by legislation, it is an iron rule, that can not be broken or bent by the courts, whatever be its effect; because it is made by a higher power. And therein consists the danger of legislating in relation to the mere details of the practice of the court, which should be allowed sometimes to conform to the exigencies of the occasion, to prevent injustice (3 *Chit. G. Pr.* 50-55).

Cusson agt. Whalon.

But it is said this notice is for judgment as in case of nonsuit ; whereas the act and the rule allow the court to "dismiss the complaint, with costs" (*Code*, § 274, *Rule* 23). The last part of § 274 is: "The court may also *dismiss the complaint*, with costs, in favor of one or more defendants, in case of an unreasonable neglect of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served." But notwithstanding this phraseology and that of the 258th section would seem to require the defendant to notice the cause in order to take a *judgment*, that is only necessary when he asks for some relief, or something more than a dismissal of the suit; and I think the defendant may have a judgment for his costs where the complaint is dismissed. Calling it a judgment as in case of nonsuit in the notice, does not mislead, and is the same thing in effect though by another name.

Another objection to the motion is, that the plaintiff was not bound to consider the cause as finally at issue, until the lapse of forty, or at least twenty days, after he served his reply; and if the latter time only, then he insists it was too late to notice. The defendant has a right to move for judgment as in case of nonsuit, whenever there is, after issue joined, time to notice the cause for trial (*Brooks vs. Hunt*, 3 *Cai. R.* 94). But formerly, not till all the pleadings in a cause were carried to an issue (*Mumford vs. Stocker*, 1 *Cow.* 602). Before the Code, perhaps this precise question could not well arise, for the party was not at liberty after plea to amend a pleading already answered (*Cowles vs. Coster*, 4 *Hill*, 550); though cases very analogous have been decided in our courts. The right to amend is now given by § 172. "Any pleading may be once amended by the party, of course without costs, and without prejudice to the proceedings already had, at any time before the period of answering it shall expire, or within twenty days after the answer to such pleading shall be served. In such case a copy of the amended pleading shall be served on the adverse party."

There is no doubt but that both parties in this case could have served notice of trial, immediately after the reply was served.

Cusson agt. Whalon.

By § 256, 'at any time after issue, and at least ten days before the court, either party may give notice of trial.' When a reply denying the answer is put in, there is an issue, notwithstanding the parties may have the mere right to amend. Though it has been decided, that if the plaintiff notices the cause for trial, before the time the defendant has to amend expires, he does so at his peril (*Paige, J.* in *Washburn vs. Herrick*, 4 *How. Pr. R.* 15. See *Shultys vs. Owens*, 14 *J. R.* 345). And Mr. Justice GRIMLEY set aside a judgment where the defendant demurred to the complaint, and noticed it for argument and took judgment by default within twenty days after service of the demurrer, and before the service of amended complaint, which was also put in within twenty days. Though he admitted both sides had pursued the plain language of the act (*Morgan vs. Leland*, 1 *Code R.* 123). And see *Hawley vs. Hanchet*, 1 *Cow. R.* 152). No doubt if the plaintiff had not amended, the defendant in that case would have been regular. The right to amend is not *per se* a stay of proceedings.

If the defendant waives his right to amend, either by noticing the cause for trial, or by express notice that he shall not amend, unless the plaintiff also may take time to amend, the latter is bound to go on. But if the defendant does not do that, I think an equitable construction will not hold the plaintiff in default, where there is not a reasonable time before circuit, to prepare for trial, after the time to amend shall have elapsed. Perhaps the statute has determined that to be ten days. There is nothing in the way of noticing the cause at any time after service of the reply; and, if no amendment be interposed, the plaintiff then would have ten days to prepare. Vigilance is always beneficial to litigants. In this case, if the time in which to amend terminated on the 20th day of January, the plaintiff had fourteen days, and should have tried the cause. It is insisted, however, that as the reply was served by mail, the defendant had forty days in which to amend (*Code*, § 172, 412, *Washburn vs. Herrick*, *supra*). This is evidently the true construction of the statute, and the provision in § 172, allowing a pleading to be amended within twenty days after the answer to it shall be served, does not limit the

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period for amendment, absolutely, without reference to § 412. Mailing is service (Van Horne agt. Montgomery, 5 *How. Pr. R.* 238).

But there is another part of the case that, after some hesitation, I think, obviates this difficulty. This suit, which is for a trespass, it appears by the plaintiff's affidavit, was originally commenced in a justice's court, where the defendant pleaded title in another, and an entry under him, and gave the requisite undertaking. I do not see how the defendant could amend his answer in this court (*Code*, § 60. And see *McNamara vs. Bitely*, 4 *How. Pr. R.* 44). If I am right on this point, there was no danger in noticing the cause without waiting for an amendment.

The motion must be granted, but with leave to stipulate. Ordered accordingly.

SUPREME COURT.

ANONYMOUS.

Under the Code, the court may order a feigned issue in an action for divorce on the ground of adultery, tried by referees, by consent of the respective parties. It is not now, as formerly, a matter of course to have such issues tried by a jury. They may, under the direction of the court, be tried by the court, a jury, or by reference.

New York Special Term, Oct. 1850. This was a suit for a divorce on the ground of adultery, in which the defendant had put in an answer denying the offence charged, thus bringing the case within section 38 of 2 R. S. 145, which requires the court in such cases to direct a feigned issue to be made up for the trial of the facts by a jury at some Circuit Court.

C. O'CONOR, for plaintiff, on a stipulation to that effect, signed by both parties, moved that the whole matter in issue be referred to referees agreed upon between them.

EDMONDS, Justice.—I have ever regarded the provision of the Revised Statutes as a wise one, because calculated to guard against that collusion, which there is so much cause to appre-

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hend in these cases, and I have been reluctant to admit that it has been superseded by more recent enactments. Yet upon a careful examination of such enactments, I do not well see how it can be doubted that the Revised Statutes have been superseded in this respect.

The Constitution, art. 1. §2, declares that a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The Code of practice, §266, declares that it may be waived with the assent of the court, by written consent, in person or by attorney, filed with the clerk; and by §270, that all or any of the issues in an action, whether of fact or of law, or both, may be referred upon the written consent of the parties.

These sections would leave it optionable with the court to waive a trial by a jury and to order a reference or refuse it, as might seem best. But there are other provisions, which establish this option more conclusively still. Sections 253, 254, declare that whenever in an action for the recovery of money only, or of specific real or personal property, there shall be an issue of fact, it must be tried by a jury, unless a jury trial is waived or a reference be ordered, and that every other issue (including of course those in suits for a divorce) is triable by the court which may order a trial by jury or a reference.

So that in cases like this, a jury trial instead of being a matter of course, as it was under the Revised Statutes, is to be had only by a special order of the court. In an ordinary case, where neither party applied for it, the court would not be likely to order a trial by jury, and the result would be either a trial by the court or a reference.

In this case, neither party asks for a trial by jury, but both agree in asking a reference. The referees named being unexceptionable, I see no reason under this manifest alteration in the law for refusing the application.

Motion to refer granted.

Lindsay agt. Sherman.

SUPREME COURT.

LINDSAY agt. SHERMAN.

The affidavit upon which an order was made under §292 of the Code, on proceedings supplementary to the execution, was not made by the judgment creditor, nor did it state that the person making it was his agent, or had any interest in the judgment, or any authority whatever; nor was the order moved for by the attorney on record. *Held*, that the order was irregular, although the affidavit was correct in all other respects and the deponent was in fact the owner of the judgment.

A motion to vacate the order, may be made to the court, without first applying to the judge before whom the proceedings are pending.

An appeal from an ex parte order, made by a judge at chambers, will not lie to the general term, under § 350 of the Code.

Essex Special Term, March 1851. The defendant had recovered judgment in this court for costs, and issued an execution which had been returned unsatisfied. On an affidavit of those facts, an order had been obtained to appear and answer, &c. under § 292 of the Code. But it did not appear by the affidavit that Shattuck, the person making it, had any interest in the judgment, or was agent for the judgment debtor; and the defendant's attorney swore, on this motion, that the proceedings were instituted without his knowledge. The opposing affidavits showed that Shattuck was the owner of the judgment.

R. S. HALE, *for the Motion.*

S. C. DWYER, *Contra.*

HAND, Justice.—Two questions arise: Was the affidavit of Shattuck sufficient? And if not, can the proceedings be set aside in this way?

The affidavit by which they were instituted, contains every necessary allegation, except that it does not show that the person deposing to the facts, has any connection whatever with the case. He does not state that he is interested, or is agent; nor does it appear that his affidavit was made at the request of, or procured by, the judgment creditor or his attorney. On the contrary, it is shown the attorney on the record had no knowledge of the pro-

Lindsay agt. Sherman.

ceedings. Had the judgment creditor or his attorney actually appeared in the matter, perhaps the case would have been different. The person making the affidavit, as the case stood before the judge, was simply a volunteer, stirring up a controversy between others, without the authority, or even the knowledge of the judgment creditor. It now appears that the affidavit was made by the assignee of the judgment; but that proof, at this time can not have a retroactive effect.

Then can the aggrieved party move to vacate the proceedings in this court? or must he first make that motion before the judge before whom the proceedings are pending, and if he fail, appeal? Or must he sue out a certiorari? I think no certiorari necessary or proper; for the proceedings are in a suit in this court. And I am inclined to think a party can not appeal from an *ex parte* order, made by a judge, at chambers, to the general term (*Code*, § 350; *Savage vs. Relyea*, 3 *How. Pr. R.* 276). This was such an order, and the motion to set it aside is made at a special term. The usual practice formerly, was to apply to the judge or officer granting the order to vacate it, and on his refusal, to appeal to the court (2 *P. & D. Pr.* 50; 1 *Burrell's Pr.* 350).

In *Rex vs. Wilkes* (4 *Burr.* 2569), it is true, Mr. Justice Yates said, "the validity of a judge's order can be impeached only in two ways, either by appealing to the court to set it aside, or, if made in vacation, by applying in the next term to set aside the proceedings that have been had under it." That appeal, however, is, in no sense, an appeal under § 350 of the Code. It is, in fact, nothing more than making a motion to set the order aside (3 *Chit. G. Pr.* 33. And see *Lyon vs. Burtis*, 4 *Cow.* 539). And I am inclined to the opinion, that the Code also authorizes the same practice. "An order made out of court, without notice to the adverse party, may be vacated or modified without notice, by the judge who made it, or may be vacated or modified on notice, in the manner in which other motions are made" (§ 324). I think this extends to a motion in court.

The proceedings must be set aside. Motion granted.

Crittenden agt. Adams and Crittenden impleaded with Roosa.

SUPREME COURT.

CRITTENDEN agt. ADAMS and CRITTENDEN impleaded with Roosa.

The time of service of notice of appeal under § 327, upon the *clerk*, when made by mail, does not date from the time of depositing in the post office.

Where such notice was served on the clerk and the attorney on the last day for bringing the appeal, by depositing in the post office, and was not received by either until two days after the time for appealing had expired. *Held*, that the appeal was not taken in time. The service was good upon the attorney (§ 408), but bad upon the clerk.

5774 Under § 173 of the Code, the court have power to authorize an appeal, taken after the expiration of the time limited by the Code (§ 332 and 348), to be considered good and valid.

Madison Special Term, October 1850.

L. KINGSLEY, *for Plaintiff*.

H. & A. L. BALLARD, *for Defendants*.

MASON, Justice.—I am satisfied, after a careful examination of this case, that the plaintiff has not met the requirements of section 327 of the Code in serving his notice of appeal. On the last day of serving his notice of appeal the plaintiff's attorney served it by depositing two written notices of appeal in the post office at the place of residence of plaintiff's attorney, some 16 miles from the clerk's office and the residence of defendants' attorneys. One of the notices was addressed to the defendants' attorneys and the other to the county clerk, and the postage thereon paid on both letters. This was on the 31st day of July last and the notice was not received by the clerk until the second day of August, two days after the right to appeal had expired, and the defendant's attorneys received their notice of appeal on the same day. The 327th section of the Code provides that the appeal must be made by the service of a notice in writing on the adverse party and on the clerk with whom the judgment or order appealed from is entered, stating the appeal therefrom, or some specified part thereof; and the 332d and 348th sections of the Code require the appeal

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to be taken within thirty days after written notice of the judgment. The appeal, therefore, in this case was not taken in time unless we hold that the depositing of the notices of appeal on the last day in the post office, properly addressed to the defendant's attorneys and the clerk is to be deemed a service both upon the attorneys and the clerk. This, it seems to me, we can not do. This service upon the attorneys was good by mail, but the service upon the clerk was not good by depositing the same in the post office, properly addressed and paying the postage. The 408th section of the Code provides that notices and other papers may be served on the *party* or *attorney* in the manner prescribed in the next three sections when not otherwise provided by this act, and one of these three sections is section 410, which allows service by mail, where the person making the service and the person on whom it is to be made reside in different places, between which there is a regular communication by mail. This is the only service by mail for which the code provides; and, as we have already seen, does not extend to the case of a service required to be made upon the clerk of the court. It follows therefore that this notice of appeal came too late, for the thirty days expired on the thirty-first day of July, and the clerk did not actually receive the notice until the 2d day of August, which was two days too late. On the second day of August the clerk received the notice, also the undertaking required by the Code on appeal, and on that day both the undertaking and the notice of appeal were filed by the clerk, and he has since made the return required by the 328th section of the Code. The plaintiff apprehending that this appeal might be considered irregular if not entirely invalid, seeks by this motion an amendment of his proceedings on this appeal, or an order allowing the said appeal to be considered good and valid. The 173d section of the Code is relied on as authorizing this court to allow an appeal to be taken after the thirty days have elapsed. The part of the section relied on reads as follows: "The court may likewise, in its discretion, allow an answer or reply to be made, *or other act to be done*, after the time limited by this act, or by an order enlarge such time;

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and may also within one year after notice thereof relieve a party from a judgment order or other proceeding taken against him, through his mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding; and whenever any proceeding taken by a party fails to conform in any respect to the provisions of this act, the court shall have power to permit an amendment of such proceeding so as to make it conformable to law." I am of opinion that this section is broad enough to embrace the case under consideration, and to authorize the court to allow the amendment asked for, or to grant an order that the said appeal be allowed to stand and be considered good and valid. The language of the statute is, "the court may in its discretion allow an answer or reply to be made, *or other act to be done after the time limited by this act.*" It should be borne in mind that this section 173 of the amended code of 1848 is new, and although a substitute for section 149 of the Code of 1848, that its language is much broader and more comprehensive, and the amendment I have no doubt was suggested by the difficulties arising under the Code of 1848 in similar cases, as will appear by a reference to the case of Schermerhorn vs. The Mayor of New York (3 How. Pr. R. 254-258), and also the case of Burch vs. Newbury (3 How. Pr. R. 271-276), in the latter of which cases it is generally understood that one of the commissioners of the code felt himself much aggrieved because a rehearing could not be allowed his client under the Code of 1848, when he had served his notice of rehearing after the time limited by the statute had expired, and which perhaps may have been the cause of the amendment as found in section 173 of the Code. The defendant's counsel in this case relies upon the two cases last cited, and also upon the cases of Gay vs. Gay (10 Paige, 375), and of Caldwell vs. The Mayor, &c. of Albany (4 Paige, 574), to show that the court has no power to extend the time to appeal where the time for appealing is fixed by the statute. I do not propose to find any fault with these adjudications. I regard them as a sound exposition of the law at the time they were made, and should be followed if the amended Code of 1849 had not expressly

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and designedly conferred upon the courts the power which we are asked to exercise in this case. It has also been suggested that the 405th section of the Code of 1849 should be read in connection with the 173d section, and as limiting the power conferred by the latter section. I do not so regard it. The 405th section is as follows: "The time within which any proceeding in an action must be had after its commencement except the time within which an appeal must be taken, may be enlarged upon an affidavit showing the grounds therefor by a judge of the court; or if the action be in the Supreme Court by a county judge." It will be seen that this section is confined by its very language to chamber orders granted by a judge out of court, and was not intended to define or limit the powers of the court as conferred by the 173d section of the Code. I have not deemed it important to consider the questions raised on this motion in relation to the undertaking executed by the plaintiff on this appeal, as the 327th section of the Code provides that "where a party shall give in good faith notice of appeal from a judgment or order and shall omit through mistake to do any other act necessary to perfect the appeal, or to stay proceedings, the court may permit an amendment on such terms as may be just." I think therefore, for the reasons above stated, that we are authorized in granting the relief sought. The papers before us show that this appeal was taken in good faith to review a judgment of the Circuit Court, and that there is a probability of a failure of justice if this motion be denied. I therefore direct an order to be entered with the clerk of Courtland county that the proceedings on said appeal be deemed good and valid, and as effectual as if they were taken and conducted in all respects in accordance with the requirements of the Code, with the exception that the second undertaking be deemed substituted in the place of the first, and that the defendants' attorneys have ten days after notice of this order in which to except to the sureties in said undertaking if they desire so to do. The plaintiff's fees on the execution in the sheriff's hands and also ten dollars costs of opposing this motion, to be paid within ten days after the receipt of this decision; and

The People ex rel. Griffin agt. the City of Brooklyn.

all proceedings on the execution in the sheriff's hands are to be stayed until the decision of the court on this appeal; and if the defendants' attorneys have not served their amendments to the bill of exceptions they are to have twenty days to prepare and serve them.

SUPREME COURT.

THE PEOPLE ex rel. GRIFFIN agt. THE CITY OF BROOKLYN

Where a common law certiorari issued against a corporation, who neglected to appear and make return thereto, *Held*, that a writ of sequestration ought not to issue until a distringas should be tried.

New York Special Term, July 1850.

A. CRIST, for plaintiffs, moved for a writ of sequestration against the defendants on an affidavit showing that they had omitted to appear or make return to a common law certiorari which had been served upon them.

H. MURPHY, *Contra*.

EDMONDS, Justice.—The ordinary process in equity to compel a corporation to appear is by sequestration, but at common law the writ of sequestration does not issue until a distringas, an alias and pluries distringas are returned.

The writ of sequestration takes from defendants all their property, real and personal, and authorizes the sequestrators to receive the rents and profits. A strong remedy and which ought not to be resorted to, except in cases of necessity. But the distringas by increasing the issues, takes less than all the property and may be equally effectual in compelling an appearance.

In this case, the proceeding is by a common law certiorari, and therefore the writ of sequestration ought not to issue, until the distringas has been tried, and besides, I see no absolute necessity for more than a distringas.

The issues may, however, be increased, and a distringas may go commanding issues to the amount of \$500, unless defendants appear and make return in twenty days.

The People agt. Townsend.

SUPREME COURT.

THE PEOPLE agt. TOWNSEND.

An indictment for perjury will not lie upon evidence given under an oath administered by arbitrators, where the submission is not according to the statute.

Upon a parol submission, or under a common law arbitration, the arbitrators possess no power to administer a legal oath.

Ontario Oyer and Terminer, Nov. 1850. Before H. WELLES, Circuit Judge; FOLGER and CLEVELAND, Justices of Sessions. Indictment for Perjury. In this case it appeared that Charles Godfrey and Reuben Lafever, on the 26th December 1848, entered into an agreement in writing, under seal, by which, among other things, the parties agreed to refer certain matters of account therein particularly mentioned to Hiram H. Seelye, John M. Bradford and James H. Wickes, who should decide on the allowance or rejection of such accounts, which decision should be final. The agreement further provided that the party who should be found owing the other should pay him the same by the first day of May 1849. The trial before the arbitrators came on at Geneva, commencing on the 8th or 9th day of May 1849, and was concluded about the 15th of the same month, when the arbitrators made their award. On such trial the defendant Townsend was introduced and sworn or affirmed by one of the arbitrators as a witness and gave evidence. Upon his testimony given on that occasion the indictment in this case was found. It appears that the arbitrators were not sworn. The indictment counts upon perjury as committed on an arbitration holden, &c. in due form of law and pursuant to the statute in such case made and provided, by and before, &c., duly chosen and appointed by the free will and choice, &c. and in pursuance of an agreement in writing between, &c., to decide and settle certain matters then in dispute between, &c. There are four counts in the indictment, the two last of which omit to state that the submission was according to the form of the statute, &c.

The People agt. Townsend.

S. V. R. MALLORY, *Dist. Att'y*, and A. WORDEN, *for the People*.
T. R. STRONG, *for the Defendant*.

WELLES, Ch. J.—Various legal objections are now taken to a conviction under these circumstances; but we will notice only two of them, as they appear to us decisive of the whole case.

1st. Had the arbitrators power to administer an oath to the defendant; because if they had not, the oath was extra judicial, and legal perjury could not be committed under it. This must depend upon the question whether the arbitration was under the statute or at common law, as they have not such power except in the case provided by the statute (2 R. S. 541; 3 ed. 628; § 1 to 5 inclusive). Under a common law arbitration, arbitrators do not possess such power. Was it then a submission under the statute? We think not. The agreement in writing clearly contemplated that the award should be made before the first day of May 1849. It does not so provide in terms, but it does provide that the party found indebted should pay such indebtedness by that time. This was a material part of the agreement, and effect must be given to it unless it should be found repugnant to some other provision, and effect can not be given to it unless it be implied that the award is to be made before that time. To suppose that such was contemplated by the parties, is doing no violence to any other part of the agreement. It seems, therefore, to follow that the powers of the arbitrators under the written agreement had expired before they entered upon their duties, and some further agreement of the parties would be necessary to enable them to act. It is not material to inquire whether such defect of power could be supplied by a parol agreement made afterwards, because if it could and was actually done in the present case, the submission would then have been by parol merely and therefore not in pursuance of the statute; and as before remarked in such case, the arbitrators would have no authority to administer an oath, and an oath administered by them would impose no more obligation upon the defendant than if administered by an overseer of highways.

It is also contended that there is a fatal variance between the

Fish agt. Forrance.

indictment and the proof, as the indictment counts upon a submission in pursuance of an agreement in writing between the parties, when the proof shows such submission must have been by parol if at all. It may be questionable whether a fair construction of the indictment will warrant this objection of variance; perhaps the clause in question may be referred to the mode of choosing the arbitrators; but still the question would remain whether in order to charge the defendant with perjury upon evidence given under an oath administered by one of the arbitrators, the prosecutor was not bound to show by the indictment that the submission was under the statute. It states that he was sworn by and before the arbitrators, which could not legally be done unless the submission was under the statute.

We think the defendant can not be legally convicted under this indictment.

SUPREME COURT.

FISH agt. FORRANCE.

Plaintiff claimed \$300 on account, and recovered less than \$100. Extra allowance denied.

Essex Special Term, March, 1851.

R. S. HALE moved for extra allowance. He said it appeared by the papers that there had been a trial on a claim for a balance of accounts between the parties. He cited Dyckman vs. McDonald (5 How. Pr. R. 121); Niver vs. Rossman (*Id.* 153).

S. AMES, read affidavits showing that the plaintiff claimed about \$300 balance due him on an account set forth in his complaint, and recovered less than \$100. He insisted it would be gross injustice to allow extra costs for endeavoring to recover three times as much as was due to him. The legislature never intended that the defendant should be punished for resisting unfounded claims or compensate the plaintiff for litigating them.

HAND, Justice.—Denied the motion.

Romaine agt. McMillen and others.

SUPREME COURT.

ROMAINE agt. McMILLEN AND OTHERS.

On sales of lands in the city of New York, in *partition*, the *notice* must be for *six* weeks, the statutory time. Rule 54 has no application to such sales. That rule applies only in cases where there is no time fixed by statute, as on a sale upon a bill filed to foreclose a mortgage, or sales of infants or lunatics lands, &c.

New York Special Term, January 1850. This was a suit in partition, wherein a decree of sale was made, directing the premises to be sold by a referee on giving three weeks notice. On such a notice, the premises were sold and the purchaser paid his ten per cent, but afterwards refused to take a deed and complete his purchase, on the ground that the notice of sale was defective. Motion is now made to set aside the sale on that ground, for a resale and that the decree be amended by requiring the sale to be made by the sheriff on giving six weeks notice.

W. B. SMITH, *for Plaintiff*DAVIDSON & BROMLEY, *for the purchaser.*

EDMONDS, Justice.—The statute requires that sales in partition shall be had after notice, for the same time and in the same manner as is required by law on sales of real estate by sheriffs on execution (2 R. S. 326, § 56; *Id.* 330, § 81). That is a notice of six weeks (2 R. S. 386, § 34). The attorney for the plaintiff in this case seems, however, to have supposed that the present rule, number 54 (which is a transcript from the 139th rule of the Court of Chancery, and the late 96th rule of this court in equity), applies to the case. That rule permits lands in the city of New York to be sold on a notice of three weeks. It is general in its language, but was never intended to have nor could it have the effect of altering the time of notice prescribed by statute. It was intended only for those cases where the statute had omitted to prescribe the duration of the notice. Thus in sales on a bill filed to foreclose a mortgage, no time for the notice of sale is pre-

Giles agt. Halbert.

scribed in the statute. So on sales of infants' lands by special guardians, or sales of a lunatic's lands by his committee.

But on sales by the sheriff on execution, or on sales by him or by any referee in partition, the notice must be for six weeks, because the statute so requires it.

This sale is therefore void and must be set aside, and the decree may be amended as required. This it is competent for the special term to do, because this is a provision merely consequent on directions already given.

5 How. 619—AFFIRMED, 12 N. Y. 82.

SUPREME COURT.

GILES agt. HALBERT.

Where a real plaintiff prosecuted a suit against the defendant for a penalty, under the statute, by virtue of a parol agreement to divide the amount, if successful, with the nominal plaintiff on record, and the defendant succeeded, *Held*, that the real plaintiff was liable for defendant's costs.

Chenango Special Term, Dec. 1850. This is a motion on behalf of the defendant, for an order compelling one Justus Parce to pay the costs of defending the above action, on the ground that he commenced and prosecuted the action to its termination, and was beneficially interested in the recovery in the same, within the provisions of 2 R. S., 619, §47. The action was instituted to recover the penalty given by 2 R. S., 369, §37, against the defendant as sheriff for selling the plaintiff's real estate, without having advertised the same. On the trial the plaintiff was nonsuited, and a new trial denied on application to the court. The affidavits on behalf of the application show that Parce retained the attorney at his own expense to prosecute the suit, subpoenaed the witnesses, and attended the trial; and that Giles, the nominal plaintiff, had nothing to do with the prosecution of the cause. The agreement between him and Parce was, that Parce was to prosecute the action to judgment, at his own expense, and in case judgment was recovered, he was to pay seven hundred dollars of

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it to Giles and retain the balance for himself. The agreement was by parol.

B. F. REXFORD, *for the Motion.*

CLARK & WAIT, *for Parce.*

SHANKLAND, Justice.—Parce brought the action in the name of Giles, and with his assent, to recover the penalty of one thousand dollars against the defendant. But it is claimed, that as the agreement between Giles and Parce was not in writing it is within the statute of frauds, and that therefore Parce was not beneficially interested in the recovery; and that the contract is also void for champerty (10 *Paige*, 352; 2 *Denio*, 607; 5 *Paige*, 301).

It is probably true, that as between Giles and Parce, the contract is void for both reasons; but is it competent to Parce to insist upon that objection on this motion? The statute on which this motion is made, was adopted for the benefit of defendants, in order to protect them against unfounded claims prosecuted for the benefit of *real* plaintiffs, but in the name of irresponsible ones; and should have a liberal construction, so as to effectuate the intent of the legislature.

It has been held that a person interested by way of mortgage, or lien, and who prosecutes the suit, is subject to the costs (1 *Hill* 629). So is he liable although an assignee of only part of the demand (1 *Denio*, 656). It seems to me, that the illegality of the contract between the *real* and *nominal* plaintiff, should not be received to defeat the defendant's right to costs. If the contract made between those parties, if legal, and carried out, according to its terms, would make the real plaintiff beneficially interested in the demand sued upon, and he actually causes the suit to be commenced, he should be held liable for the costs.

I therefore hold that the agreement of Parce to have a part of the penalty sued for, and his causing the action to be commenced and prosecuted, by virtue of such agreement makes him liable for the defendant's costs; and those costs having been personally demanded of him, without being paid, an attachment must issue against him.

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The Genesee Mutual Insurance Company agt. Moynihen.

SUPREME COURT.

THE GENESEE MUTUAL INSURANCE COMPANY agt. MOYNIHEN.

Where the answer admitted the execution of the note (premium note) and the delivery of the policy of insurance, but as to each and every other allegation alleged in the complaint, the defendant had not sufficient knowledge to form a belief (the complaint alleging the facts upon which the defendant had become liable upon the premium note). *Held*, that the answer was sufficient, under § 149, 1st subdivision, to put the plaintiff to his proof.

Monroe Circuit and Special Term, Nov. 1850. Motion for judgment upon the complaint upon the ground of the insufficiency of the answer.

The action is upon a premium note given by the defendant to the plaintiff. The note is in the words and figures following: “\$70. For value received in policy No. 7295, dated Nov. 27th 1843, issued by the ‘Genesee Mutual Insurance Company,’ I promise to pay the said Company or their treasurer for the time being, the sum of seventy dollars, in such portions and at such time or times as the directors of said company, may, agreeably to their act of incorporation require. Andrew Moynihen.”

The complaint sets forth the note, the issuing of the policy of insurance, together with other facts by reason of which the plaintiff claims the defendant is liable to pay the note.

The answer is in the following words: “The said defendant, Andrew Moynihen, for answer to the complaint of the plaintiff, says that he admits the execution of the said note and the delivery of the said policy of insurance; and the defendant further says that as to each and every other allegation in the said complaint set out and not herein expressly admitted, this defendant has not any knowledge thereof sufficient to form a belief.”

HATCH & HATCH, *for Plaintiff.*

J. C. COCHRAN, *for Defendant.*

WELLES, Justice.—The law as to what an answer shall contain is found in § 149 of the Code. The first subdivision of that section is as follows: “The answer of the defendant shall contain,

Daniels agt. Hinkston.

1. In respect to each allegation of the complaint controverted by the defendant, a general or specific denial thereof, or denial thereof according to his information and belief, or of any knowledge thereof sufficient to form a belief."

The answer in this case is clearly within this section. The facts admitted are the execution of the note and the delivery of the policy. With regard to the residue of the complaint the defendant denies any knowledge thereof sufficient to form a belief.

If the facts admitted by the answer were sufficient to entitle the plaintiff to recover, this motion would be in order, and judgment would now be rendered in favor of the plaintiff. But such is not the case. There are material allegations in the complaint which are not admitted, and which remain to be established. The defendant by this denial has put the plaintiff to the proof of them. (See *Monell's Prac. ed.* of 1849, p. 146.)

The motion must be denied, with \$7 costs.

SUPREME COURT.

DANIELS and DANIELS, Administrators, and DANIELS, Administratrix, agt. HINKSTON.

A justice of the peace had no power to take judgment by confession, for a sum greater than one hundred dollars, under the Code of 1848.

This was an action brought in January 1849, to recover \$247.09, the amount of two promissory notes executed by the defendant Hinkston. The defendant alleged in his answer that on the 29th day of November 1848, he appeared before a justice of the peace of the county of Genesee, with the plaintiff Daniels, and duly confessed judgment on said note in pursuance of sections 113 and 114 of the 8th article of title first chapter second part third of the Revised Statutes. The plaintiff replied that the justice had no power to take such judgment by confession. Cause tried at the March circuit, 1850, in Genesee county

A. P. HASCALL, for Plaintiffs.

S. B. JEWETT, for Defendant.

Dorr Appellant agt. Birge and Wells Respondents.

MULLETT, Justice.—The 45th section of the Code of 1848, expressly repealed the 2d section of the Revised Statutes concerning the jurisdiction of justices of the peace, and the statute of 1840 amending the same. These were the only statutes empowering a justice to take judgment by confession for any greater amount than was embraced in his general jurisdiction. At the time the judgment in question was confessed the justice had no jurisdiction to enter judgment for that amount. The judgment was therefore a nullity and can form no basis to the plaintiffs' right to recover upon the notes. It is true the Code of 1849 restores to a justice the jurisdiction which had been taken away from him by the Code of 1848; but this does not help the case; the amendment of 1849 can not have a retroactive effect. The last section of the Code of 1849 can not give it that effect. All there is of that it happened to be a part of the Code of 1848 which was not amended. The plaintiffs must therefore have judgment for the amount claimed in the complaint with costs.

SUPREME COURT.

Dorr Appellant agt. Birge and Wells Respondents.

In respect to causes originating in a Justice's Court, the Supreme Court has merely an appellate jurisdiction. It can only review and correct the decisions of the County Court actually made, after a hearing of both parties. It has no power to review a judgment rendered in the County Court by default.

Albany General Term, May 1850. Before Justices WATSON, PARKER and WRIGHT. Dorr sued Birge & Wells before a justice of the peace, in the town of Lansingburgh, for taking away a wagon, and recovered a judgment for \$73.17 damages and costs. The defendants appealed to the county court of Rensselaer county, where the judgment was reversed with costs. The plaintiff then appealed to this court. It appeared by the papers returned on appeal to this court, that the judgment of reversal in the county court, was recovered by default.

J. K. PORTER, *for Appellant.*

R. M. & M. I. TOWNSEND, *for Respondents*

Dorr Appellant agt. Birge and Wells Respondents.

By the Court, PARKER, J.—We are met on the threshold of the examination of this case, by the objection that the judgment of the county court, which the appellant now seeks to reverse, was rendered by default; and it is contended that in such case, the judgment ought to be affirmed or the appeal dismissed. If this objection is well taken it will be unnecessary to examine the merits of the controversy as it existed before the justice's court.

In *Cheetham vs. Tillotson* (5 *John.* 430), the late court for the correction of errors reversed, on error, a judgment rendered in the Supreme Court by default. The objection does not appear to have been taken in that case that a writ of error would not lie to review a judgment recovered by default. The only question, discussed by counsel and decided by the court, was whether the declaration set forth a sufficient cause of action?

But since the determination of that case there has been a series of decisions, holding that neither an appeal nor a writ of error would be entertained by that court except for the purpose of reviewing an actual determination of the court below.

In *Sands vs. Hildreth* (12 *John. R.*, 493), the cause was regularly noticed for hearing in the Court of Chancery. The defendants did not appear, and a decree was taken by default, from which the defendants appealed to the Court for the correction of errors. But the court unanimously held that an appeal would not lie from a judgment voluntarily suffered by default, and ordered the appeal to be dismissed with costs.

In *Gelston vs. Hoyt* (13 *John.* 561), the defendant's counsel had declined arguing a demurrer before the Supreme Court, and judgment was of course given for the plaintiff. It was held by the court for the correction of errors that the defendant could not on bringing a writ of error to that court, object to the propriety of a judgment which had thus passed against him by default. The question was then fully examined by the chancellor, and the general rule laid down that no point could be raised in a court of appellate jurisdiction, which was not argued in the court below.

In *Henry vs. Cuyler* (17 *John. R.*, 469), judgment had been

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taken in the Supreme Court, on demurrer, and the writ of error was quashed on the ground that the judgment sought to be reversed was recovered by default.

In *Colden vs. Knickerbocker* (2 *Cowen R.* 31), it was held that the writ of error to the Supreme Court would not lie upon a judgment by default, and if brought, that the proper course was neither to affirm or reverse, but to dismiss the writ of error. The same doctrine has been reiterated in *Campbell vs. Stokes* (2 *Wend. R.* 146), *Houghton vs. Starr* (4 *id.* 179), *Wood vs. Young* (5 *id.* 620), *Kane vs. Whittick* (8 *id.* 219).

It is said this rule was peculiar to the late court for the correction of errors, and owed its existence to a provision in the state constitution of 1777, which, in instituting the court (*Art. 32*), declared that "if a cause shall be brought up by writ of error on a question of law on a judgment in the Supreme Court, the judges of the Court shall assign the reasons of such their judgment," and made a similar provision in case of an appeal from the Court of Chancery. It was argued that neither the judges nor the chancellor could assign reasons for their judgments, where such judgments had passed silently by default; and that it could not, therefore have been intended by the constitution to review judgments voluntarily suffered by the party's default. But it will be found on examining the cases above cited, and particularly that of *Gelston vs. Hoyt*, that the constitutional provision above referred to formed but one of four reasons assigned by the court, why a judgment obtained by default ought not to be reviewed in the appellate court. The general rule is laid down, that no point can be raised in an appellate court, which was not argued in the court below.

Such is also the rule in the English house of lords (*Dean vs. Abel*, *Dicken's R.* 287; 2 *Sch. & Laf.* 712).

This court is now the court of last resort, with regard to causes originating in a justice's court. No appeal will lie from the determination of this court in such an action to the Court of Appeals (*Code*, §11). The jurisdiction of this court is only appellate. It can only review the decisions of the County Court,

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which in such causes, is also an appellate tribunal. If a party to the appeal before the County Court may suffer a default there, and then appeal to this court, it would be equivalent to appealing in the first instance directly from the judgment of the justice of the peace to this court. It is the judgment of the County Court that is to be reviewed in this court, and a party ought not to be subjected to the expense of an appeal to this court, until he has had the deliberate consideration and judgment of the County Court. This was plainly contemplated by the statute. The Code provides (§ 344) that no appeal shall be allowed from a judgment of a county court in a case arising in a justice's court, unless the party desiring to appeal shall, within thirty days after notice of the judgment, present to a judge of the Supreme Court the return of the justice, or a copy thereof, *with the decision* of the county court, and obtain from such judge a certificate that he has examined the case, and in his opinion an appeal to the Supreme Court should be allowed." The county court is expected to make a decision upon the questions presented by the return of the justice. It can hardly be said to do this where judgment is reversed by default. In such case the return is not presented to or read by the county judge. The party appearing is entitled to the judgment moved for, on proof of due service of notice of motion (*Rule 28*). The rules of this court are applicable to all the county courts. (*Code*, § 470)

The question presented on appeal to this court, in this case, is not whether the justice of the peace rendered an erroneous judgment. That was the question before the County Court, and the plaintiff failing to appear before that court, pursuant to notice, the defendants were entitled to a judgment of reversal. If that judgment was irregularly entered, or if for any reason the party was unable to appear in time, that court only can afford relief on motion. I am satisfied this court is vested with no authority in this case except to review and correct the decisions of the county court actually made after a hearing of both parties.

The appeal must therefore be dismissed with costs.

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SUPERIOR COURT.

ROBERTS agt. RANDEL.

An action "to recover personal property" can not be maintained where the defendant has not in fact or in law the possession or control of the property claimed.

Consequently an order for arrest under the 3d sub. of § 179 can not be granted in such a case (where the sheriff returns he is unable to obtain the property, &c.) (This is adverse to the case of *Van Neste agt. Conover*, ante 148.)

The "claim and delivery of personal property" under the Code is a substitute for *replevin* as heretofore existed under the Revised Statutes; which was a possessory action against personal property, or for damages for its detention; and in its application to the disposal of property limited, to a removal of it made to avoid the service of the writ.

(In the cases of *Cary vs. Hotaling* and *Olmsted vs. Hotaling*, 1 Hill, 311, 317, this doctrine is stated that *replevin* can be maintained in all cases where the party can bring *trespass de bonis asportatis*. HELD, that this was merely an assumption by the court, and its application to such a case as the present, unfounded.)

This was a case where the plaintiff delivered a Texas bond to the defendant (as broker) to be sold at a specified amount. The plaintiff claimed that the defendant had disposed of it under the amount, and thereby unjustly converted and detained it. This action was for the bond itself.

January 1851. Before OAKLEY, Ch. Justice, and SANDFORD and PAINE, Justices; with the concurrence of the other three Justices, DUER, MASON and CAMPBELL.

This is an appeal from an order made at chambers, discharging an order for the arrest of the defendant made under the third subdivision of section 179 of the Code of procedure. The defendant had been arrested under that order, and imprisoned for default of bail. The action was brought, in form, for the recovery of the possession of personal property. The plaintiff, claiming a delivery of the property, placed in the hands of the sheriff an affidavit and a requisition for its delivery pursuant to sections 207 and 208 of the Code, with the proper security. The sheriff certified that the property had been concealed, removed or disposed of, so that he could not find or take it. Thereupon the justice at chambers made the order for the defendant's arrest. The plaintiff's affidavit for the delivery and for the arrest, showed that the action was brought for the conversion of a bond of the state of Texas,

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which was delivered by the plaintiff to the defendant as a broker, to sell for not less than forty per cent on the amount of principal and interest, and which the defendant, some months prior to the suit, sold for forty per cent on the amount of the principal only. That the plaintiff thereupon demanded of him the bond itself, and also the amount of it at the price limited for its sale; neither of which demands was complied with by the defendant. The affidavits further alleged that the bond was obtained by the defendant with the fraudulent intent of converting it to his own use. After his arrest, the defendant offered to give to the sheriff the bail for his appearance; but the sheriff required the undertaking prescribed in section 211 of the Code.

E. FITCH SMITH, *for Plaintiff.*

D. GOULD, *for Defendant.*

By the Court, SANDFORD, Justice.—The first question arising on this appeal, is whether the plaintiff can bring an action “to recover the possession of personal property” in a case like this. By his own showing, the defendant parted with the property long before the suit was commenced; and whatever it may be called, the suit is really one to recover damages for the conversion of the property. We have examined the subject with much care and are clearly of the opinion that the plaintiff is not entitled to the remedy which he claimed and which was granted to him by the order at chambers.

That order is one of the “provisional remedies,” established by the seventh title of the Code. The claim and delivery of personal property, is itself one of those provisional remedies, and the order in question is consequent upon the failure of that remedy. Arrest of the party is provided by the title cited, in five classes of cases. The first class embraces, among others, actions for the recovery of damages for wrongfully taking, detaining, or converting property. This, beyond dispute, applies to the plaintiff’s cause of action here. The third class is thus expressed: “In an action to recover the possession of personal property unjustly detained, where the property or any part thereof has been concealed, re-

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moved or disposed of, so that it can not be found or taken by the sheriff (*Code*, §179, *subd.* 1, 3). The bail required in the first class, is for appearance to answer the process of the court, that required in the third class, is virtually for the payment of the judgment which may be recovered in the action. It is evident that in all cases arising under the third subdivision, the plaintiff may claim an arrest and bail under the first, which gives the arrest in an action for wrongfully detaining property. But to obtain the arrest and security provided by the third subdivision, besides the unjust detention, it must be shown that the property sought to be recovered has been concealed, removed or disposed of, so that it can not be found or taken by the sheriff. In this clause, we find the real distinction between the two kinds of arrest. The first is given in suits for damages, claimed for the wrongful taking or detaining of property. The second is given in suits where the party seeks the recovery of the *identical property* itself. Such a suit, in our judgment, can be brought only where the property is in the possession or under the control of the person who is made defendant. To bring an action against John Doe, to recover the possession of goods which the plaintiff knows he has long since sold and delivered to Richard Roe, is idle and unmeaning. This is made more manifest, by the clause already stated, on which the whole thing turns. The goods must have been concealed, &c., so that the sheriff can not take them. The words are, "*has been removed &c.*" Now, although a sale of the property by the defendant, months before the suit, will have the effect to prevent the sheriff from taking the goods from him; we think it quite apparent that such was not the disposal intended by this section. If it were, there would have been no occasion to add the words, "so that it can not be found or taken by the sheriff." The provision, without those words, would have been complete to reach every case where the defendant had parted with the property illegally taken or detained. The words just quoted, were added to qualify the provision, and limit it to cases where the defendant had not only disposed of the property but had disposed of it so as, and in order, to prevent the sheriff from executing the process for its delivery;

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which could only be after the commencement of the suit; or after the sheriff, by the receipt of the process, was entitled to make such delivery; or when made with a view to defeat expected process, which would be a disposal in fraud of the law.

To test this conclusion, let us examine the chapter entitled "claim and delivery of personal property," out of which the arrest in question arises. Section 206 enacts that in an action "to recover the possession of personal property," the plaintiff may, when he issues the summons, or at any time before answer, "claim the immediate delivery of such property," as provided in that chapter. Thus the action is to be one, not for *damages* for illegally taking, detaining or converting property, nor for the value of such property; but it is for the recovery of *the possession* of the property itself. To this end, the remedy claimed, is the delivery of the very property, which the sheriff can not do, in a suit against one who has not the thing to be delivered. This distinction between actions to recover damages for the wrongful taking or detaining goods, and actions for the recovery of specific personal property, is maintained in the judgment to be rendered as well as in process (*Code*, § 246, *subd.* 2). And if under section 206, an action to recover the possession of personal property, may be brought against one who has sold and delivered it, and has neither the possession nor the control of it; why may not an action to recover the possession of real property, or to recover real property, be brought against any person who once possessed or claimed it, though he has sold his right and parted with his possession to others? We can not see how an action can be said to be brought to recover the possession of a specific chattel, when it is brought against a party who avowedly has not the chattel, and from whom no power of the court can procure it.

To return to the Code. The affidavit to be made by the plaintiff must state, among other things, "that the property is wrongfully detained by the defendant," and the alleged cause of the detention thereof (§ 207). This assumes that the property is in the possession or control of the defendant. It is a detention, by him, existing at the time the affidavit is made; else how can the

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party make oath that it *is* wrongfully detained *by the defendant*? Then in executing the process, the sheriff of the county where the property is supposed to be, is required to take it from the defendant and deliver it to the plaintiff (§ 208; and see § 211, 214). Without pursuing minutely, the details of the chapter, they all proceed upon the basis of an action against specific property, and are addressed to giving it effect against such property, in the possession of the defendant. The only provision against the defendant's person, is that already commented upon, and is given when through his act the sheriff is prevented from executing the process issued to take the property out of his possession.

Unless we are right in our interpretation of these provisions, we must hold that the legislature has provided two distinct provisional remedies, in all cases where under the former system, trespass or trover could be maintained; by one of which the defendant may be held to give the special bail of the old system, and by the other may be required to give security to pay the judgment that may be recovered in the action; and the latter remedy being so much more efficacious than the other, it will of course supersede it altogether. It is a remedy, as insisted on in this action, which in all cases of the alleged wrongful taking or detaining of personal property, will subject defendants who have disposed of the property, however innocently, to imprisonment from the commencement of the suit, until its termination, unless they can give security to pay the judgment sought; and if a judgment be recovered until they pay it, or are discharged under the insolvent laws.

We can not be induced to believe that the legislature intended to make such a harsh and violent change in the law; one so inconsistent with the other provisions for arrest contained in the same section, and so totally at variance with the whole tendency of our legislation for the last twenty years in respect to imprisonment upon civil process; and we are entirely satisfied that the provisions of the Code, construed in their plain and fair import, lead to no such result. We think the remedy contained in subdivision one of the 179th section, was designed for precisely such

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cases as that of the plaintiff in this suit; and that the stringent provision in the third subdivision was intended to execute justice upon parties who should attempt to defeat the process of the court in suits to recover specific property, by putting the property out of their hands and thereby preventing its seizure by the sheriff. A history of the enactment corroborates this opinion. It appears for the first time, in the amended Code of 1849. The bail required in such a case in the Code of 1848, and in the action of replevin by the Revised Statutes, was the ordinary special bail that the person of the defendant should be amenable to the process in the action. No change in this respect, was proposed by the commissioners on practice and pleadings in 1849, and the change was made by the legislature of that year in their amendments to the Code of 1848.

We were referred by the plaintiff's counsel to the cases of Cary vs. Hotaling and Olmsted vs. Hotaling, in the late Supreme Court (1 *Hill*, 311, 317), as authority that replevin could be maintained after the party had sold and parted with the goods which he had illegally taken or detained. There is no doubt that the "claim and delivery of personal property," in the Code, was intended as a substitute for the provisional relief theretofore obtained in the action of replevin (*Report of Commissioners of Practice, &c. in 1848, page 169*). We have, therefore, maturely considered these authorities. The question really controverted in the first case cited, was whether trespass would lie under the circumstances; and in the second, whether a partner who had not participated in the fraud, could be made liable in tort with his guilty copartner. It was undoubtedly assumed by the judge who delivered the opinion of the court, that replevin could be maintained in all cases where the party could bring trespass *de bonis asportatis*, but he did not discuss the point, and it does not appear to have been presented. The evidence showed that the defendants had sold the goods before the suits were brought, and therefore the point existed in the cause, although it was not noticed. As the law then stood, the only arrest authorized in replevin was that now provided in the first subdivision of section 179 of the

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Code, and the party could be held to bail with the same effect in trespass. The point was therefore of no practical importance.

Was the assumption of the judge in the cases in 1st *Hill*, warranted by the law as it then existed? Previous to the Revised Statutes replevin could not have been maintained in those cases. Although learned judges, by way of illustration, frequently said before the Revised Statutes, that replevin would lie wherever trespass could be brought, they did not intend to say that they were concurrent remedies in all cases. Wherever trespass would lie, and the goods were possessed by the defendant, replevin could be maintained; and this was all that those judges intended to assert. The same remark might be made as to most of the instances in which, since the revised statutes, judges have said that replevin would lie wherever the party could maintain trespass or trover.

We repeat, that before the revised statutes, there was no such thing in this state as replevin against a party, after he had entirely divested himself of the possession and control of the goods claimed; except in the single case of distress for rent where the distrainor had proceeded fraudulently or contrary to the statute permitting a replevin within five days. (By fraud in the proceedings, we mean some act of the distrainor analogous to the driving of a distress out of the hundred or shire in England.) The action was purely possessory. It sought the specific goods, and was fruitless unless the goods were seized, or other goods taken from the defendant *in withernam* in the excepted case just stated, as a substitute for those distrained, or the distrainor having *eloigned* the latter beyond the reach of the sheriff. The judgment was for the property already seized and restored to the plaintiff, with damages for its detention. There was no judgment for its value, or for any other damages. Hence the action always ensued immediately on the taking of the property. It was even contended, on distresses for rent (which at that period were the origin of most of the actions of replevin), that the suit could not be brought after the five days within which the tenant was permitted to make a replevy, although it were commenced before

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an actual sale of the distress. We refer, for the state of the action before the Revised Statutes, to Co. Litt. 145, b.; Bacon's Abr. Replevin, A.; 2 Dunlop's Pr. 872, 880; Graham's Pr. 55, 726, 1st ed.; and *Jacob vs. King*, 5 Taunt. 451.

The Revised Statutes extended the action of replevin, to cases where the original taking of goods was lawful and they were wrongfully detained; and it is described to "be brought for the recovery thereof, and for the recovery of damages" for the unjust caption or detention. The form of the writ is prescribed thus: "Whereas A. B. complains that C. D. has taken and does unjustly detain (or 'does unjustly detain,' as the case may be);" and it commanded the sheriff, on receiving security for a return of the goods, if a return should be adjudged, &c., to replevy the goods and deliver them to the plaintiff, and to summon the defendant; and if he could not find the goods, then to take the body of the defendant &c. The statute next prescribed the manner of executing the writ, by delivering the possession of the property to the plaintiff (2 R. S. 522, &c., § 1, 6, 8, 10). "If the property described in the writ, have been removed or concealed so that the sheriff can not make the delivery thereof," he was required to arrest the defendant, who was thereupon to give bail as in personal actions (*Ibid.* § 11, 12, 22 to 27). This was a substitute for the *capias in withernam* of the common law, and was extended to all cases of replevin. The declaration (§ 36,) is again carefully limited to a detention existing at the commencement of the suit. The whole statute, without citing it more at large, shows that the action was still a possessory action against personal property, extended to cases where before, even if the goods were in the defendant's custody, trover or detinue were the only remedies.

By the Revised Statutes several valuable changes were made in the practice in replevin, besides the substitute of the arrest before mentioned; among others, a judgment for the value of the property and damages, where the plaintiff has not obtained the goods by the replevin. The language of the eleventh section, before cited, taken in connection with the nature of the action

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as declared by the first section and the form of the writ and the declaration, was plainly limited to a removal of the property made to avoid the service of the writ. It seems to us entirely incongruous to make the statute say, when the writ is given only for a present detention, that the party shall be arrested under it, for a disposal of the property made before it was issued. We do not intend to speak of removals in fraud of the law when a writ was expected.

The revisers in proposing the changes in replevin, say it has been extended so as to make it a substitute for *detinue*, and a concurrent remedy with trespass and trover, in all cases of the unlawful caption or detention of personal property. We suppose the latter expression was used by the revisers, in the same sense that it was before that time used by judges, in comparing replevin with trespass, as we have already mentioned. We do not imagine that the revisers intended to say that by their proposed change, replevin could be brought against the bailee of a horse, a year after he had sold the horse to a stranger. In fine, we are fully convinced, that the Revised Statutes did not warrant the bringing of replevin in a case like the one before us, and that the assumption to that effect in the cases cited from 1st *Hill*, was unfounded.

Such being our conclusion, and all agreeing that the "claim and delivery of personal property" under the code, is a substitute for replevin as it before existed; it fortifies our opinion founded upon the Code itself, that this provisional remedy can not be maintained against a party who has not in fact or in law the possession or control of the property claimed.

Some stress was laid on the addition in the Code of the words "disposed of," to the removal or concealment mentioned in the eleventh section of the Revised Statutes. We think this was intended to provide for the event of the defendant's selling or otherwise parting with the proper in fraud of the action; as for example, after the action was commenced and before service by the sheriff. It can not be supposed that those words were designed to change the whole nature of the remedy substituted for

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replevin, and to give it a scope vastly wider than its original ever had obtained.

Upon the whole, we entertain no doubt that the plaintiff has misconceived his remedy, and that an order for arrest under the third subdivision of section 179 of the Code, can not be made in a case like this.

The order appealed from must be affirmed. (*a.*)

(*a.*) The case of Van Neste agt. Conover (5 How. Pr. R. 148), was not known to the court until after this decision. It would not probably have affected the conclusion to which the court arrived.

5 How. 336—FOLLOWED, 6 How. 9, 10.

SUPREME COURT.

COLLOMB and others agt. CALDWELL and others.

Where two defendants appear and defend separately, and each demurs to the complaint, and both demurrers are allowed with leave for the plaintiff to amend on payment of costs; each defendant is entitled to costs, as follows; Proceedings before notice of trial, \$5.00. 2. Subsequent proceedings before trial, \$7.00. 3. For the trial of the issue of law, \$12.00.

A motion for a readjustment of costs should be made before payment thereof and without the loss of a term, or some reasonable excuse must be shown.

Saratoga Special Term, January 1851.

WILLARD, Justice.—This is a motion for a retaxation of costs in the nature of an appeal from an adjustment thereof made by the clerk of Montgomery county, under § 311 of the Code. This adjustment or taxation was made by the clerk, upon notice to the plaintiffs from the defendants, on the 1st day of November last. The costs were allowed to the defendants, who severally demurred to the complaint; the demurrers being allowed, and the plaintiffs having leave to amend on payment of the costs of the demurrers, within twenty days. The plaintiffs paid the costs voluntarily within the time. Since the taxation, and indeed, since the payment, there have been several special terms, at which this motion might have been made.

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I. The defendants having appeared and defended severally, were each entitled to a bill of costs.

II. The costs were correctly adjusted. The costs contemplated by the rule were those incidental to the demurrer. They embrace proceedings before notice of trial (\$5.00); that is the drawing and the copies of the demurrer. 2. The subsequent proceedings before trial (\$7.00); this is what was formerly comprised under the head of brief and points. 3. For the trial of the issue of law (\$12.00). This, under the former practice, was covered by the counsel fee on argument. In some cases it would be more in some less than the corresponding charge under the Code.

III. The plaintiffs should have moved at an earlier day, or be able to give some excuse for the delay. They should have moved before payment of the money. They paid without objection.

The motion must be denied with seven dollars costs to each of the defendants, Mitchell and Reed.

5 How. 227—*Contra*, 3 Duer 669; 5 How. 310; 14 d. 430.

SUPREME COURT.

ROWELL agt. MCCORMICK AND BELDEN.

Where an attorney signs his name and "place of residence" to papers; the service of papers upon him must be directed to the *post office at that place*. If directed to another post office, in the same town, it is irregular service. The "place of residence" in Rule 5, must be understood with reference to the name of the post office to which papers are directed. *It seems*, that by § 405, the time to appeal (30 days), can in no case, be enlarged. (*This appears to be adverse to the case of Crittenden agt. Adams, ante page, 310.*)

Monroe Special Term, Oct. 1850. Judgment was rendered at a special term on the 27th day of June 1850, for \$457.70, in favor of plaintiff against defendants. Notice of judgment was received by defendants' attorneys on the 1st day of July 1849. On the 29th July the defendants filed the requisite undertaking with a view to an appeal. Notice of the appeal and of the undertaking, with a copy of the undertaking, was mailed at the

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post office at Rochester, where the defendants' attorneys resided, on the 29th day of July 1850, between 1 and 4 P. M., postage paid, directed to the attorney for the defendant at "Clarkson Corners, Mon. Co."

In the town of Clarkson there are three post offices bearing the names of "Clarkson," "Clarkson Centre," and "East Clarkson." There is no post office in Monroe county by the name of "Clarkson Corners." The action was commenced by summons and complaint, to both of which and to the plaintiff's reply to the defendants' answer, the plaintiff's attorney's name was subscribed as such, with the addition of "Clarkson." The letter enclosing the notice of appeal, &c. was sent from the post office at Rochester to the post office at "Clarkson Centre," from which it was forwarded to the "Clarkson" post office charged with five cents postage, where it arrived on the 3d day of August and was handed to the plaintiff's attorney on the evening of that day; an execution had been issued upon the judgment on the 2d of August.

The post office named "Clarkson Centre" is located about four miles north of the village of Clarkson, where the post office of the name of "Clarkson" is situated, and is where there are four corners made by the crossing of an east and west and north and south roads. The village of Clarkson, as one of the affidavits states, is usually called Clarkson Corners. A motion is now made to set aside the execution for irregularity.

O. M. BENEDICT, *for Defendants.*

S. B. JEWETT, *for Plaintiff.*

WELLES, Justice.—The plaintiff was regular in issuing his execution. Notice of the judgment was served on the 1st day of July, and on the 1st day of August the time for appealing expired. The notice of appeal was misdirected, and did not reach the plaintiff's attorney until the 3d day of August. That was too late and he had a right to disregard it. The envelope was directed to Clarkson Corners, where there was no post office of that name, and if it went to either of the post offices in the town of Clarkson, it was as likely to go to one as the other of the three. It is shown

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that it in fact went on to one four miles beyond the right one and was sent back charged with postage, which the plaintiff's attorney had to pay before he was entitled to receive it. The plaintiff's attorney in conformity with rule 5, in subscribing and endorsing his name to the previous papers, had added his place of residence, and the notice of appeal, &c. should have been directed to that place. An attorney has the right himself to decide where he resides for the purposes of the rule, and if papers are served upon him by mail, they must be directed accordingly, provided he has complied with the rule in subscribing and endorsing his papers. The words "place of residence," in rule 5, must be understood with reference to the name of the post office to which papers are to be directed. The motion must therefore be denied with \$7-00 costs. I am not able to see that there is any relief for the defendant. By § 332 of the Code, the appeal must be made in thirty days after written notice of the judgment; and section 405 seems to contemplate that the time can in no case be enlarged. *But see 5174*

SUPREME COURT.

Noxon agt. GREGORY.

Noxon, Appellant agt. GREGORY Respondent.

A judgment in the hands of an assignee who purchased with notice and parted with no new consideration, is liable to be set off against a judgment against the assignor existing prior to the assignment.

The lien of an attorney for his costs is subordinate to the equities existing between the parties.

The attorney trusts to the responsibility of his client.

Saratoga Special Term, January 1851. The facts are sufficiently stated in the opinion of the court.

WILLARD, Justice.—On the 20th July 1850, the plaintiff in the first above entitled action, recovered judgment against the defendant for \$124.68 damages and costs, and which still remains due and unpaid. On the 7th Oct. 1850, the respondent in the second

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suit recovered judgment against the appellant therein for \$78.97. Executions were issued on both judgments, but nothing has hitherto been collected on either. The plaintiff in the first action now applies to set off so much of his judgment therein against the judgment in the second action, as will discharge the same. This motion is resisted by the attorneys for the respondent, on two grounds; 1st, that they on the 8th October 1850, took an assignment of the last mentioned judgment from the respondent and received from him the sum of \$20 in cash, in consideration of which they assumed to pay Beach & Bockes their counsel fees for arguing the cause, and to discharge the defendant from his liability to them as his attorneys. And 2d, they insist on their lien as attorneys for so much of the judgment as is unpaid of their costs.

I. The attorneys parted with no new consideration when they took an assignment of the judgment. The judgment was at that time subject to the equitable claim to a set off in favor of the plaintiff in the first suit. Gregory is chargeable with notice of that judgment, because he was a party to it. One of his attorneys in the second suit, Mr. Williams, swears that at the time of the purchase "he did not know that any judgment existed in favor of said Noxon against said Gregory." The other member of the firm, Mr. Hibbard, makes no denial at all. The denial of Mr. Williams is quite insufficient. He may have had full *information* of the obtaining of that judgment and of its remaining due and unsatisfied, and yet not had that *knowledge* of it which would have enabled him to prove it in a court of justice. The denial is equivocal. It should have gone to all *information*, or *notice* of the judgment to be available. The right of Noxon to offset his judgment existed at the moment the other judgment was obtained, and it can not be defeated by an assignment to a party who does not deny notice of it, and who parts with no new consideration on the faith of the assignment.

II. The second ground, viz: the lien of Williams & Hibbard, as attorneys, is equally untenable. It does not appear how much of the judgment is composed of their costs. But this court has

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uniformly held for above fifty years that the attorney trusts to the responsibility of his client, and that his lien is subordinate to the equities existing between the parties. The cases on the subject are collected by SAVAGE, Ch. J., in *The People vs. N. Y. Com. Pleas* (13 *Wend.* 651, *et seq.*), and by COWEN, J., in *Nicoll vs. Nicoll* (16 *Wend.* 447).

The plaintiff was wrong in asking for costs, and had the opposition been merely to that branch of the motion, the defendant would have been entitled to the costs of opposing. Each party has asked for too much, and therefore costs will be given to neither, as each succeeds in part.

The motion to set off so much of the plaintiff's judgment in the first action against the judgment in the second action as will be sufficient to discharge the same, must be granted.

5 How. 341—OVERRULED, 6 How. 273

SUPREME COURT.

LITCHFIELD agt. BURWELL AND OTHERS.

The *appointment* of a referee must be made by the court (§270 and 273) although parties may agree upon a suitable person for a referee. The court must be satisfied that the selection made by the parties is a proper one.

A referee who proceeds in a cause, by virtue of an appointment by stipulation of the respective parties, merely, acts without authority.

The facts upon which a plaintiff relies for judgment against infant defendants, must be established by legal proof, notwithstanding, the attorney for the guardian of the infant defendants may have consented in writing that such judgment be taken, upon the report of a referee.

The guardian's responsibility to the infants does not help the difficulty.

Consent to use as testimony what the law will not recognize as such, can not avail, although it be incorporated in a report of a referee.

Where the court clearly discover that the interests of infants are committed to a guardian who is not likely to protect them, he should be removed and a proper one appointed.

The service of a summons, to be used as evidence against defendants who have not appeared, is defective, where the sheriff's certificate is produced which states "that he served on them a copy of a summons and complaint," without mentioning any cause in which it was served.

5 How. 341—APPLIED, 12 Abb. 359, 361; s. c. 21 How. 286, 297; 34 Barb. 95, 97. FOLLOWED, TUCK. 470, 476. *Contra* on single point, 5 How. 273. REVIEWED, 8 Abb. 123, 125; 3 Redf. 507 reference, see 6 How. 278; 7 Id. 42 out State, REVIEWED, 8 Abb. 125. A 97; s. c. 21 How. 297; s. c. 12 Abb. Barb. 553; 8 Johns. 194; 33 Barb. 14. See 13 How. 43; 4 Cow. 223. 5

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Such service is likewise defective, where an admission of service purporting to be signed by some of the party's defendants is produced without some evidence of their signatures being genuine, or were written to the admission with their assent. The court takes judicial notice of the signatures of its officers, but are not presumed to know the signature of a party defendant, who has not appeared.

The admission of service of summons by party's defendants residing out of the state, is ineffectual as the basis of any judicial proceeding in *personam* in this state.

Erie Special Term, Dec. 1850. The complaint in this cause is in the nature of a bill in equity, to correct an alleged mistake in a deed of conveyance executed by Joseph Clary in the year 1830. Erie county is specified as the place of trial.

The plaintiff claims through various mesne conveyances, under Clary's grantee. It appears from the complaint, that the land in question lies in the city of Buffalo, and it is alleged that only a small part of the land described in the deed was owned by Clary, but that he owned an adjoining lot which is the one intended to have been conveyed. The object of the suit is to obtain a conveyance of these premises.

Joseph Clary has been dead for a number of years and the defendants are made parties as his devisees. Four of the defendants are infants, and appear by a guardian, duly appointed on the application of the plaintiff, and one adult defendant appears by an attorney. An affidavit is presented here showing that no other defendants have appeared; that none of the adult defendants have answered, and that a general answer has been put in for the infants.

The attorney for the guardian ad litem, and the plaintiff stipulated that the cause should be referred to a person residing in the city of New York and that the hearing should be had there. The plaintiff moves upon a report of this person, who acted as referee, and the evidence before him, the affidavit above mentioned, notice to the parties who have appeared, and what is claimed to be due evidence of service of the summons on those who have not appeared, for a judgment pursuant to the prayer of his complaint. He also produces the written consent of the attorney for the guardian of the infant defendants, that he may take such judgment.

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The attorneys for the plaintiff reside in New York; the attorney for the guardian resides in Albany.

JOHN GANSON, *for the Plaintiff*.

SILL, Justice.—There are fatal objections to granting a judgment in this case. It may be proper to remark that the moving counsel is not responsible for the irregularities appearing here, as he is not the attorney in the case. By the Code parties may consent to a reference and may agree upon a suitable person for a referee; still it directs the appointment to be made by the court (§ 270-273). The person selected must be suitable for the purpose (§ 273); and if the court is satisfied that the selection is not a proper one, the order appointing him (at least in the case of infant defendants) may undoubtedly be denied, notwithstanding the stipulation.

The person assuming to act as referee in this case proceeded without authority, and his report has no more legal force than a communication from any other gentleman, who might address the court, on the subject of this suit.

Passing by this objection, the testimony taken by the referee (as he is called) was incompetent, and if admissible would have been wholly insufficient to justify the conclusion at which he arrived.

It appears that two witnesses only were examined. The testimony of one went merely to show that the plaintiff had been in possession by his tenant of the premises claimed, at some specified period in 1837 or 1838, and subsequently. This testimony seems to have been taken before the referee on the 23d September 1850. The other witness resides in Buffalo; is a general land agent, as he says, and has been for several years the agent of the plaintiff. He was examined upon written interrogatories addressed to him at Buffalo, and answered without the intervention of a commissioner or referee.

The guardian for the infants does not propose cross interrogatories or to cross examine the witness; nor does it appear that he had any notice of the proceedings. The witness drew up his own answers to the interrogatories and verified them informally

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(and I am inclined to think extra judicially) before a commissioner of deeds, on the 11th of October 1850. After this, and on the 15th of October, the attorney for the guardian stipulates at Albany that these answers may be read before the referee and that the referee may proceed in the cause without further notice to him.

The witness states that he came to Buffalo in 1834, four years after the deed in question was executed. He says that Clary did not own the land, described in the conveyance in 1830, but that he owned an adjoining lot.

That the land described in the deed belonged to one Brown. He undertakes to show also by parol, from whom Brown and Clary derived title to their respective lots, but he does not trace the title even by parol to any legitimate source, or show that any of the persons he names as grantors were ever in possession, or ever saw either lot. One of the interrogatories put to the witness assumes that there was a mistake in the deed, and asks the witness when he discovered it. He answers, in 1843.

This is the substance of this persons information, for it is not testimony, and incompetent and insufficient as it is, the referee reports that a mistake in the description of the land is proved. The witness not only fails to show that he has any personal knowledge of a mistake, but shows affirmatively that he could not have any such knowledge.

In answer to the last general interrogatory the witness volunteers to refer to a letter which he had previously written to one of the plaintiff's attorneys, and says that the letter is true according to his best knowledge and belief. This paper purports to contain some disjointed and imperfect extracts from the will of Joseph Clary. Upon this verification this letter is admitted as evidence, and is deemed sufficient to prove the execution and contents of the will, and to establish the character of the interest of these infant defendants in this land. It is impossible that such a proceeding can be upheld. Both the attorney for the guardian and the referee grossly mistook their powers and their duties. The facts which will entitle the plaintiff to a judgment must be

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established against these infants by legal proof. Neither the guardian ad litem, or any other person has power to waive this proof nor any right without it to consent to a judgment. This is a rule of law that can not be evaded, by consenting to use as testimony what the law will not recognize as such, and the consent of the attorney for the guardian that what is here called testimony, but which does not rise to the dignity of a well authenticated rumor, should be received, does not justify the referee in acting upon it as evidence.

It may be thought that the guardian's responsibility to the infants, is an answer to these objections. This is no reason why judgment should be given against them without proof. As well might it pass without any investigation at all, upon a tender of indemnity for the injury it might work to their rights. The guardian erred in committing the interest of these infants exclusively to an attorney, who seems to have acted under the idea that a guardian was appointed for the convenience and facility of the plaintiffs and not for the protection of the defendants.

The 56th rule of the court forbids the appointment of a guardian ad litem, for infant defendants, who is not their general guardian; or an attorney or officer of the court, who is fully competent to understand and protect their rights.

The rule undoubtedly contemplates that where an attorney is appointed guardian, he shall give his personal attention to the interests committed to his charge.

It is not practicable in this case to distinguish between the acts of the guardian and those of the attorney to whom he seems wholly to have committed the trust reposed in him. If these infants have any rights in this case their interests are now committed to hands where they are not likely to be protected, and I do not see how I can consistently avoid the unpleasant duty of removing this guardian and appointing another in his place.

An order of reference might perhaps be now made but for the fact that the evidence of the service of the summons on some of the parties who have not appeared is defective.

For the purpose of showing service on the defendants Judd and

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wife, a sheriff's certificate is produced, which states that he served on them a copy of a *summons and complaint*, but it does not appear that they were the summons and complaint in this cause.

The service upon the defendants Norman Rice and wife, is sought to be proved by an admission to which their names are written, but there is nothing showing that the signatures are those of the defendants, or were placed there by their direction. The court takes judicial notice of the signatures of its officers because they are such; but I am not apprised of any theory or legal fiction by which the court are presumed to know the signature of a party defendant who has not appeared in the cause (2 *Hill*, 369).

The Code makes the defendant's admission evidence of service, but I can not know that it is the admission of these defendants without some evidence showing the signatures to be theirs, or that their names were subscribed to it with their assent.

There would be another difficulty in this case even if I could take judicial notice of the genuineness of these signatures. The admission is not dated at any place, nor does it state where the service or admission was made. But in looking into the letter of the Buffalo witness, which the plaintiff has made evidence against himself, I find it there stated that Norman Rice and wife reside in the state of Michigan. In the absence of any proof to the contrary it must be assumed, and probably such is the fact, that the service and admission were made in that state. Service of process out of the territorial jurisdiction of the court from which it issued was at common law a nullity, and service of the process of our courts on defendants out of this state is inefficacious as the basis of any judicial proceeding in personam (*Hulburt vs. Hope Mutual Ins. Co.*, 4 *How. Pr. R.* 275; same case same vol. 415).

Proceedings may be had against property in this state belonging to a non resident. But notice must be given to such non resident in the mode which the Code specifies (§ 135), and which it calls service of a summons in the suit. In all such cases an order for publication made by the court or a judge is indispensable and then the effect of a personal service is merely to dispense

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with the service by mail, prescribed by the Code of procedure (§ 135, sub. 6). Without an order and publication personal service is unavailable.

The motion for a judgment is denied. The application for an order of reference upon the stipulation of the plaintiff's attorney and the guardian ad litem, is denied, upon the ground that the cause is not shown to be in readiness for a reference and upon the ground that it appears that the person named in that stipulation is not a suitable person for a referee in this case.

But the plaintiff is at liberty upon producing the proper evidence of service on the parties, who have not appeared, and notice to those who have, to move for a reference to a suitable person, or to make such other motion in the premises as he shall be advised.

The order must also direct that the guardian ad litem of the infant defendants be removed, unless cause is shown against it at a future term, and that Dennis Bowen, counsellor of this court, residing in the city of Buffalo, be appointed in his place, and all orders and papers in the case are hereafter to be served on Mr. Bowen as such guardian.

SUPREME COURT.

BENEDICT agt. HARLOW AND WENDELL.

The attorney has no lien on the damages recovered for his client, until the same is actually received by him.

The parties have a right to settle the suit *before* judgment, without first paying the attorney his costs.

It seems, that under the Code attorneys have no lien for their costs, unless there be a special contract to that effect.

Washington Special Term, March 1851. This was an action of assault and battery and false imprisonment, commenced since the Code of 1849, and was tried at the Saratoga circuit on the 4th February 1851, when the plaintiff obtained a verdict against the defendants for thirty dollars damages. On the 8th of Febru-

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ary, and before judgment was entered on the verdict, the defendants settled with the plaintiff, the subject matter of the suit, and paid him thirty dollars; in consideration of which the plaintiff executed to them a release under his hand and seal, discharging them from the damages and costs in that suit, and admitting the same to have been fully settled.

On the 26th of February, the plaintiff's attorneys gave notice of an adjustment or taxation of costs before the clerk and the same were taxed at \$80.44, and judgment was entered up by the clerk on motion of the plaintiff's attorneys for thirty dollars damages and thirty dollars costs. The defendants' attorneys produced at the time and exhibited their release from the plaintiff and objected to the taxation of the said costs and entering up of said judgment. But the plaintiff's attorneys refused to recognize that settlement by the plaintiff and entered up judgment as aforesaid.

The defendants have moved to set aside the judgment as irregularly entered.

On the part of the plaintiff the motion is resisted on the ground that the settlement by the defendants and payment of thirty dollars to the plaintiff was a fraud upon them, and will, if sustained, deprive them of all compensation. They show that the plaintiff was insolvent and that they had advanced the disbursements. They have read affidavits tending to show that the defendants knew that the settlement would operate as a fraud upon the plaintiff's attorneys.

MEEKER & CULVER, *for the Defendants.*

W. B. LITCH, *Contra*

WILLARD, Justice.—It was held in *St. John vs. Dieffendorff and Allen* (12 *Wend.* 261), that the attorney has no lien on the damages recovered by his client until the money is actually received by him. Hence the party has a right to receive the damages, or to discharge them, without receiving them, against the wish of his attorney. The attorney's lien, if he has any upon the damages, does not attach while the money is unpaid. Possession is essential to constitute a lien (*McFarland vs. Wheeler*, 26 *Wend.* 467).

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Prior to the Code the attorney who had recovered a judgment for damages and costs was treated, with respect to the costs, as an assignee, and his right to the costs was protected against any discharge which might be made by his client. Many of these cases are reviewed by Mr. Justice PAGE in *Wilkins vs. Batterman, sheriff, &c.*, at the Albany general term, in July 1848 (4 Barb S. C. R. 47). In that case the plaintiff, who was committed on a ca. sa. for costs, was discharged out of custody by the sheriff, by the direction of the party, in whose favor the judgment was obtained. The court held that the ca. sa. was for costs only, it was notice to the sheriff that the money belonged to the attorney, and they held that the sheriff was liable as for a voluntary escape in permitting the plaintiff to go at large at the instance of the defendant. It was an act done by the client in fraud of the attorney, and the sheriff, by concurring in the act, became responsible for the consequences. In that case and in all the others which are cited, the action had passed into judgment before the improper interference of the client with the opposite party occurred. The lien of the attorney was consummated by the taxation of the costs and perfecting of the judgment. Such was the case in *Wilkins vs. Batterman, supra*; *Martin vs. Hawkes* (15 J. R. 405); *Ten Broeck vs. De Witt* (10 Wend. 617); *Bradt vs. Koon* (4 Cowen, 416).

Those cases are all distinguishable from this. The plaintiff has received no money on which his attorneys had a lien. The thirty dollars which he received belonged to him alone, and was unincumbered with any lien in favor of his attorneys (12 Wend. 261, *supra*). Here was merely a settlement of the action before judgment, which the client had a right to make. In *Mitchell vs. Oldfield* (4 D. & E. 123), BULLER, J., says that the court will not interfere on behalf of the attorney *and prevent the plaintiff settling his own cause without first paying the attorney's bill*, yet, when the adverse party, against whom a judgment has been obtained, applies to get rid of that judgment, the court will take care that the attorney's bill is satisfied. The plaintiff was under no restriction with respect to his right to settle the action.

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His attorneys trusted to his personal responsibility and integrity. Hence, if this motion is to be decided by the law as it existed before the Code, the entry of this judgment was irregular.

If the Code has created any changes in the practice in this respect, it is adverse to the claim set up by the plaintiff's attorneys. The 303d section abolishes all statutes establishing or regulating the costs or fees of attorneys, solicitors or counsel in civil actions, and all existing rules and provisions of law restricting or controlling the right of a party to agree with an attorney, solicitor or counsel for his compensation, and thereafter it leaves the manner of such compensation to the agreement, express or implied, of the parties. In *Davenport vs. Ludlow* (4 *How. Pr. R.* 337), Mr. Justice SHANKLAND intimated an opinion that an attorney under the Code can have no lien for his costs. The cause, indeed, went off upon another point and this question was not settled. If it were necessary, in this case, to pass upon that question, I should incline to follow the *dictum* of the learned judge. The reason for upholding a lien in favor of the attorney does not exist under the Code. The attorney's compensation is no longer measured by the fee bill, but rests in contract. There is no higher necessity for granting him a lien on the judgment for costs than there is that a carpenter or mason should have a lien upon the house he has built, or an agistor of cattle should have a lien upon the animals he depastures; neither of which had a lien at common law. The principles on which a lien is given to inn-keepers, carriers and certain mechanics who have made repairs upon property of their customers are inapplicable to attorneys.

In any aspect in which this case can be viewed, the defendants had a right to settle the suit before judgment, without making themselves liable to the costs of the plaintiff's attorneys. In paying the damages to the plaintiff, they have not interfered with any right of his attorneys. If the latter fail to receive compensation for their services, it will be for a cause which existed when the action was commenced—the poverty of their client.

The motion to set aside the judgment must be granted.

SUPREME COURT.

GARDNER AND OTHERS, Appellants, agt. BROWN AND OTHERS, Exr's
&c., Respondents.

A surrogate will be compelled to make a return to an appeal, within a *reasonable* time (no time being fixed by statute or the rules), by an order of the court on pain of attachment.

An objection that his fees have not been paid, is of no avail where it appears they were offered to be paid when ascertained.

Yates Special Term, October 1850. Motion for attachment against the surrogate of Yates county for not making return to appeal.

The affidavit upon which the motion is made, shows that the appeal was brought on or about the 19th August 1850, and that no return has been made by the surrogate. That the attorney for the appellants has frequently requested the surrogate to make the return, and offered to pay him his fees; that the surrogate always promised to make such return but has not yet done so; that on the 3d October 1850, the appellants' attorney was told by the surrogate that the return was not commenced, but that he would make it as soon as he got through some recording.

E. VAN BUREN, *for Appellants.*

A. OLIVER, *Surrogate, in person.*

WELLES, Justice.—I have not been able to find any statute or standing rule of court or rule of practice, prescribing any particular time within which the surrogate is required to make his return to an appeal. By the 118th rule of the late Court of Chancery, the party appealing was required to cause the transcript of all the proceedings before the surrogate, &c., to be made, authenticated and returned to the appellate court within twenty days from the time of entering the appeal in the court below, or the chancellor might dismiss the appeal, unless further time was allowed for the return of the transcript. The 82d of the present rules of this court, which regulates appeals from the de-

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eisions of surrogates, does not contain the above provision; and if it did, it would not determine the question within what time the return is to be made.

It is undoubtedly the duty of the surrogate to make his return as soon as practicable, and if he neglects unreasonably to do so, this court has the power, and would exercise it, to order him to make the return on pain of attachment (*Halsey vs. Van Amringe*, 4 *Paige*, 279). The appellant is bound by the above 82d rule to file his petition of appeal within fifteen days after the appeal is entered in the court below; or the appeal will be regarded as deserted by the appellant, and will be dismissed on motion; and he can not compel the respondent to answer the petition until the return is filed (*Halsey vs. Van Amringe*, *supra*). The appellant is therefore tied up and his appeal is stayed in its progress until the return is made.

It is suggested that the fees of the surrogate should have been paid for making the return before this motion was noticed. The affidavit shows an offer to pay the fees, and it does not appear that the omission to make the return has ever been put on the ground of the non payment of the fees. Besides, I think, under the circumstances of this case an offer to pay was sufficient. It was all the appellants could do. They could not pay until they knew the amount, and I think an offer to pay was equivalent to a strict tender of the money, at least, until the amount was ascertained and the appellants informed of it.

An order should be entered directing the surrogate to make the return within twenty days from the service of the order, or that the appellants be at liberty to move thereafter, upon due notice to the surrogate, for an attachment against him.

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SUPREME COURT.

GRAHAM agt. McCOUN AND OTHERS.

An answer which is required to be verified is not duly served, unless a copy of the answer and of the affidavit of verification are both served.

The omission of the name of the magistrate before whom such affidavit is taken in the copy served, renders the service irregular.

Schenectady Special Term, April 1851. The plaintiff moved for judgment for want of an answer. It appears that the complaint was duly verified, and an answer thereto was prepared and duly verified in season, and a copy thereof served on the plaintiff's attorney; but in the copy served the name of the magistrate before whom the affidavit to the answer was sworn to, was omitted by mistake. It was immediately added, and re-served, but not in time.

B. F. AGAN, *for the Motion.*

J. PIERSON, *Contra.*

WILLARD, Justice.—The only question in the case is whether the omission in the copy served, of the name of the officer, before whom the answer was verified, renders the service irregular. Under the former practice, the court held in *Livingston vs. Cheetham*, that the omission of the jurat and signature of the party to a copy of an affidavit on which a motion was made, formed no objection to the service (2 *J. R.* 479). That case has been followed in similar cases, ever since. But that case is different from the present. The opposing party could ascertain whether the original papers were sworn to, by raising the objection on the argument. The original being present could be inspected; and whether inspected or not, it is not to be presumed that the court would grant a motion founded upon an affidavit not regularly verified. But in the case of an affidavit to a pleading, the party on whom it is served has no means of knowing whether the original was sworn to, without sending to the clerk's office to inspect it. In *Chase vs. Edwards* (2 *Wend.* 283), it was held

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that where the jurat was an essential part of the affidavit without which it would be unintelligible, a copy of it should be served with the affidavit. The *name* of the officer, they say, may be omitted but not the *date* of the jurat.

Under the former practice, pleas in abatement were required to be verified by affidavit, and to be filed with the affidavit. And in the English practice where the parties procured copies from the office, the omission to file an affidavit with the plea, justified the plaintiff in treating it as a nullity and signing judgment as for want of a plea (1 *Str.* 639; 2 *Ld. Ray.* 1409; 2 *Arch, Pr.* p. 2).

In this state, after the adoption of the rules of April term 1796, requiring pleadings to be served, and computing the time to answer, from the time of the service of a copy of the pleading and notice of the rule, and up to the time of the adoption of the Code, the party was held to be bound by the pleading served (*Smith vs. Wells*, 6 *J. R.* 286). He had a right, therefore, to assume that the original on file was in all respects like the copy served. If the parties required that the plea should be verified, a copy of the plea, and of the affidavit of verification must be served. If the copy of the affidavit did not contain the name of the officer to the jurat, the opposite party had a right to presume that the original was not sworn to, and to act accordingly. Such was the practice when the Code took effect.

The Code is entirely silent on the present question. It requires, indeed, all pleadings to be subscribed by the party, or his attorney (§ 156), and points out the mode of service (§ 408 to 412). It does not, in terms, require the affidavit, accompanying the pleading, to be served at all; nor does it declare the effect of an omission to verify the pleading, when a verification is required. These points are, therefore, left to be decided by the well settled principles of practice in analogous cases. It follows, that a copy of the entire affidavit verifying a pleading should be served with the pleading, and if that affidavit be defective, the adverse party may treat it as a nullity, and return it or move to set aside the pleading. The omission of the name of the officer, before whom

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the answer was sworn to, was a defect for which the plaintiff might treat the service as a nullity. He had a right to assume that the original was not sworn to at all.

As the answer was in fact sworn to and contains a defence, the defendant is permitted, within ten days after service of a copy of this rule and on the payment of ten dollars costs, to serve a corrected copy. The plaintiff's motion for judgment is therefore denied.

SUPREME COURT.

JOHNSTON agt. BRYAN.

Where a summons is served stating that the complaint will be filed in the clerk's office of a certain county (§ 130); a *motion for judgment* in favor of the defendant, for not serving a copy of the complaint, must be made in that district or a county adjoining the one in which it is stated that the complaint will be filed in another district (§ 401).

Monroe Circuit and Special Term, Nov. 1850. Motion for judgment in favor of the defendant in the nature of non pros.

The summons was served on the defendant on the 10th day of August 1850, and required the defendant to answer the complaint, &c., which the summons stated would be filed with the clerk of the county of Oneida, and to serve a copy answer on the plaintiff's attorney's at Utica within twenty days, &c.

On the 12th August 1850, the defendant handed the copysummons to his attorneys residing in Rochester, and retained them to defend the action, and they on the next day (13th Aug.) served, through the mail, notice of retainer and a demand in writing of copy of complaint upon the plaintiff's attorneys, who resided in Utica.

The motion is founded upon the neglect to deliver a copy of the complaint.

A preliminary objection is taken by the plaintiff's counsel that the motion can not be made here, but should have been made in the fifth district.

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WELLES, Justice.—By section 401 of the Code, motions must be made within the district in which the action is triable, &c. Section 142 provides that the complaint shall contain the title of the cause, specifying the name of the court in which the action is brought and the name of the county in which the plaintiff desires the trial to be had, &c. By section 130, in case the complaint be not served with the summons, the latter shall state where the former will be filed; and if the defendant within ten days make demand in writing of a copy of the complaint specifying a place within the state where it may be served, a copy thereof shall be served accordingly, &c. By rule 3 of this court, papers are required to be filed in the office of the clerk of the county specified in the complaint as the place of trial.

In this case no copy of the complaint was served with the summons, nor has it since been served. It does not appear whether it has yet been filed. The summons stated it would be filed with the clerk of Oneida county. If it has been filed, it must have been there or it would have been irregular, because the summons stated it would be filed there, which was necessary by § 130.

I think it can not be maintained that this motion could be regularly made either in the fifth or sixth district, at the option of the defendant. If that were so, by the same rule it could be made anywhere in the state, at the defendant's election. There is no good reason why it could be made in Monroe county any more than in Chautauque, St. Lawrence or New York. I incline to the opinion that the motion should have been made in the fifth district, unless Oneida county adjoins some other district, in which case it may be made in a county in such other district adjoining Oneida (§ 401).

When the motion shall be so made, the plaintiff will not be allowed to object that it does not appear where the action was triable, as it would be presumed that when the complaint should be filed in Oneida county, it would specify that county as the place of trial. The motion is therefore denied; but as the question is new, and involves a construction of various provisions of the code, no costs are allowed for opposing.

Williams agt. Wilkinson.

SUPREME COURT.

WILLIAMS agt. WILKINSON.

Although § 162 of the Code allows an amendment of a pleading once, of course, and without costs, yet as to costs, it can apply only where the first pleading has been regular.

If the opposite party has prepared and served motion papers to set aside the first pleading for irregularity, which is cured by the amendment, the party amending must pay such costs, even if his amendment is in time under that section.

Yates Circuit and Special Term, October 1850. Motion on behalf of defendant to set aside complaint.

The affidavits on the part of the defendant show that the complaints which were served on the 20th day of September 1850, did not contain the name of the county in which the plaintiffs desired the trials to be had, according to section 142 of the Code.

On the part of the plaintiff it is shown that the name of the county was omitted by mistake. That immediately after service of the notice of this motion and before the expiration of twenty days after service of the complaint, an amended complaint was served, in which the county of Yates was inserted as the place of trial.

It is admitted by the counsel on both sides, that when the amended complaint was served, the defendant's attorney objected to receiving it, unless the costs of the motion were paid; and that no costs were paid or offered.

E. VAN BUREN, *for Defendant.*

W. S. BRIGGS, *for Plaintiff.*

WELLES, Justice.—The defendant was regular in preparing for and serving notice of this motion. The plaintiff's counsel contends that he also is regular in amending, and that § 172 of the Code entitles him to the amendment of course, and without costs. That section, I apprehend, applies only to a case where the party wishing to amend his pleading, has been regular, or where he amends before his adversary has taken any steps founded

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upon an irregularity. It would allow the statute to become an instrument of oppression if the plaintiffs in this case are to avoid the payment of the costs of the motion by curing the defect complained of by means of an amended complaint, served after the defendant had prepared for and given notice of the motion.

The motion must be granted with ten dollars costs, unless the plaintiff within twenty days pays the defendant's attorney ten dollars costs, and stipulates to allow the defendant twenty days thereafter to answer the amended complaint.

5 How. 358—*Contra*, 8 How. 463.

SUPREME COURT

GOULD AND OTHERS agt. CHAPIN AND OTHERS.

On appeal from a judgment upon a report of a referee, *the date of issue* on the general term calendar, must be the day of *filing the report*.

Monroe General Term, June 1850. Before WELLES, P. J., and SELDEN and JOHNSON, Justices. This is an appeal from a judgment on the report of a referee, the decision of the referee to stand as the judgment of the court.

The appellant put the cause upon the calendar, and in the note of issue, stated the time the last pleading was served, according to which the clerk gave it precedence on the calendar.

S. B. JEWETT, for the respondent, moved to correct the calendar by putting the cause down so as to take date only from the filing the report and entering the judgment.

M. T. REYNOLDS, *for the Appellant.*

By the Court, WELLES, Justice.—Neither the Code or the present rules have provided in what order causes shall be placed on the general term calendar. The former practice must therefore govern (§ 469 of the Code and rule 92 of this court.) Law rule 51 of the rules of this court, adopted in July 1847, provided that the note of issue to be filed with the clerk should contain, among other things, “the date when the question arose,” and rule 53 of

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the same rules required the clerk to make up the calendar according to such dates. Such had long been the practice before (*Gr. Pr.*, 2d ed. 671-2), and there is nothing inconsistent with it in the Code or the present rules of this court.

In case of a motion to set aside an inquisition or report, the question was deemed to have arisen on the day when the writ of inquiry with the return, or when the inquisition or report was filed (*id* 672). In analogy to that practice we think the question in this case must be deemed to have arisen on the day when the report of the referee was filed.

Let the calendar be corrected accordingly.

5 How. 389—FOLLOWED, 40 How. 46.

COURT OF APPEALS.

ENOS AND OTHERS, Respondents agt. THOMAS and HUNTER, Appellants.

An order of the Supreme Court denying a motion for stay of proceedings on the judgment, and for liberty to move to set aside a report of referee without an appeal, or for an order extending the time to appeal, is not an appealable order.

March Term, 1851. Motion to dismiss an appeal from an order made at a general term of the Supreme Court held at Albany on the 20th September 1850, denying a motion made on the part of the defendants for a stay of proceedings on the judgment, and for liberty to move to set aside the report of the referee without an appeal, or for an order extending the time to appeal,

E. F. BULLARD, *for Respondents*.

N. HILL JR., *for Appellants*.

By the Court, Ruggles, Ch. J.—This was not such an order as can be brought into this court to be reviewed on appeal. It involved a question of practice merely, addressed to the discretion of the court below (2 *Comstock*, 186; 3 *id.* 342).

McMahon and Wife agt. Harrison.

COURT OF APPEALS.

McMAHON AND WIFE, Respondents agt. HARRISON, Appellant.

An appeal from a judgment of the Supreme Court reversing an order of a surrogate, with costs, is premature, if brought before the amount of costs are ascertained and roll filed; whether a stay of proceedings is sought or not.

March Term, 1851. Motion to dismiss an appeal from a judgment of the Supreme Court, by which an order of the surrogate of the city and county of New York, allowing letters of administration to issue to Harrison, was reversed, with costs both in the Supreme Court and in the Surrogate's Court. The order for judgment of reversal bears date on the 8th of March 1851. Harrison appealed on the 13th of the same month. The costs had not then been taxed or ascertained and the judgment roll had not been filed.

A. LOCKWOOD, *for Respondents.*

A. MATHEWS, *for Appellant.*

By the Court, RUGGLES, Ch. J.—The appeal having been made before the amount of the costs were ascertained, and the judgment roll filed, it was premature. Until the costs are taxed or settled it can not be known, in cases in which the proceedings are to be stayed, in what sum the sureties are to justify; and it is better that the practice should be the same where the proceedings are not stayed as where they are. The party desiring to appeal may by motion and order in the court in which the judgment is rendered, compel the other to perfect his judgment, if he delays to do so. The appeal must therefore be dismissed, but without costs.

SUPREME COURT.

ENOS AND OTHERS agt. THOMAS AND HUNTER.

After judgment the only mode of reviewing the decision of a referee is by an appeal from the judgment.

The court has not the power to enlarge the time to appeal, where notice as required by section 327 of the Code has not been given within the time required by the statute. (PARKER, Justice, dissenting. *This point is decided directly adverse to the case of Crittenden agt. Adams, ante p. 310.*)

The dictum in Traver vs. Silvernail (2 Code Rep. 96), disapproved.

How far the court may review the decision of a referee or jury, *before judgment*, pursuant to the old practice. Quere.

Albany General Term, Dec. 1850. Before Justices WATSON, PARKER and WRIGHT. This action was referred to a referee, who reported in favor of the plaintiffs, January 24, 1850. On the 22d February 1850, a copy of said report was duly served on the defendants' attorneys, who reside at Buffalo. On the 8th day of March 1850, Justice SILL, at Buffalo, granted a stay of proceedings for twenty days before judgment, in order to give the defendants liberty to move to set aside the report.

Upon notice to the plaintiff's attorney, on the 28th day of March, the defendants moved before Justice SILL for a further stay of proceedings for the same purpose, but which motion was opposed and denied on the ground that Justice SILL had no authority to make an order out of the fourth district and not adjoining Saratoga county. The defendants then applied to the plaintiffs, attorney to stay proceedings by stipulation, but such stay was refused by letter dated April 1, 1850, on the ground that the questions being merely exceptions and points of law, it was not a proper case to review before judgment, but that the defendants should take their remedy by appeal after judgment. The defendants acquiesced in this view of the case by not applying for a further stay to one of the justices of the fourth district. After a motion for extra costs had been made and granted, on the 27th day of April 1850, a judgment was entered upon the report of the referee in favor of the plaintiffs and roll filed in Saratoga county. Notice of said

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judgment was personally served on the defendants' attorneys May 1, 1850, and an execution was issued to Erie county, where the defendants resided, May 6, 1850.

On the 13th day of June 1850, the defendants filed notice of appeal and undertaking and served notice also on the plaintiffs' attorney, but no notice was given or other act done until more than thirty days after notice of the judgment, except that the papers were drafted in the attorney's office before the thirty days had expired, and the defendants' attorney swears he forgot to serve them within the thirty days.

Thereupon the plaintiffs noticed a motion for the general term to be held in Clinton county, July 1, 1850, to dismiss said appeal, which was granted by default. The excuse given why said defendants did not oppose that motion was that Mr. Tift, one of the plaintiffs, who resided at Buffalo, on the application of the defendants' attorneys consented verbally to have said motion stand over until the Albany general term, to be held September 1850. The defendants' attorneys also applied by letter to the plaintiffs' attorney to postpone the motion, but he immediately answered and refused to ratify the arrangement of Mr. Tift. Afterwards, the defendants' attorneys say that they had not time to prepare papers and go personally to Clinton county in time to oppose that motion. The defendants noticed the cause for argument and put it on the calendar at the Albany general term, September 1850, and also moved for liberty to review said judgment without an appeal and for a stay or for an order extending the time to appeal and to open the default dismissing the same. The motion was argued at the September term.

J. K. PORTER, *for Defendants.*

E. F. BULLARD, *for Plaintiffs.*

By the Court, WATSON, Justice.—If this court had *power* to relieve the defendants as a matter of discretion, it would be a great indulgence of that discretion to allow them to appeal after so long a delay, and after allowing the appeal to be dismissed at the July general term held in the fourth district. It would be beyond

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all rules of indulgence to set aside the judgment entered in April last, after due notice, and after a stay of proceedings *before* judgment had not been obtained from the court and had been expressly refused by the plaintiffs' attorney upon the ground that the defendants would be required to appeal and give security. By allowing the judgment to be afterwards entered the defendants elected their remedy by appeal.

The defendants' counsel now insists upon their right to review the decision of the referee, *after* judgment, by motion to set it aside and for a rehearing, the same as under the old practice, in the same manner as if the legislature had not enacted the Code.

Before the Code any party upon procuring a stay of proceedings upon a case might move the court for a new trial upon a matter arising at the circuit, and to set aside the report of a referee. In both instances this motion went to the general term, unless in the case at the circuit, the judge who tried the cause chose to hear it argued before himself in the first instance. But in either case the motion must have been made before judgment.

As stays of proceedings were generally granted as a matter of course, almost all cases were reviewed before the general term, and thus that court became overburdened with business, and delays were necessarily tedious. To remedy this and other evils of a like nature, the judicial force of the state was greatly increased by the new constitution. This was not found to be an adequate remedy, and therefore the legislature provided that "the *only* mode of reviewing a *judgment*, or order in a civil action, shall be that prescribed by this title," which is prescribed to be by appeal (*Laws of 1849, page 680, § 323*).

"To render an appeal effectual for any purpose, a written undertaking must be executed," &c. (*page 681, § 334*).

The case provided for on a trial by the court may be made at any time within ten days *after* notice of the *judgment* (*page 668, § 298*).

The decision by the referee, so far as entering judgment and reviewing the same is concerned, is placed upon the same ground as if the action had been tried by the court (§ 272).

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It seems that the legislature intended to place a trial before a referee and the court upon the same footing, and also that the review of the *decision* should be *after judgment*, and by appeal, with security given. It does not appear that they intended to make any other substantial alterations or to alter the powers of the court at general term in regard to such reviews. We can not see why a case brought before the court by *appeal* under the Code, should not be argued and decided in the same manner as if it had been carried before the court at general term by *motion* under the former practice. Until the legislature think fit to alter the *powers* of the general term of the court upon a case made, the court see no cause for assuming to do so. With this view of the case the practice under the Code seems entirely simple and it would seem that there has been no substantial change in the practice except requiring the case to be made *after judgment*, and the same to be carried before the general term by appeal with security given.

The term "*rehearing*," as used in section 272, seems to be synonymous with "*new trial*." It was undoubtedly intended to apply also to county and recorders' courts. It would seem absurd to require an appeal to the Supreme Court from the Recorder's Court to correct an error of a referee in the latter court, when such error might be corrected in that court in which the judgment was rendered. Hence that power was given to the Recorder's Court without driving the party to appeal to the Supreme Court under section 344, page 683 of Laws of 1849.

It seems to be clear, therefore, that the only mode of reviewing a decision under the *Code after judgment* is by appeal.

If the party aggrieved desires any different remedy he can not seek it under the Code, but must look back to the old practice not inconsistent with the present statute. In case of surprise, newly discovered evidence, or irregularity in a verdict or decision the court, before judgment, on motion undoubtedly has the power to do justice in the given matter, and in such a case the remedy might perhaps be at the special term, but that question is not necessarily raised here. But such relief or proceeding is not a *review* of the decision, verdict, report or judgment. It presup-

poses such decision, so far as matters appeared upon the trial, to be *right*, and does not ask for a review thereof, but for special or equitable relief.

In the next place it is insisted on the part of the defendants that they would be without a remedy on a question of fact, as an appeal from a judgment entered upon a report of a referee does not bring up questions of fact. If that question arose in this case probably the court would concur with the decision of Justice GRIMLEY in *Pepper vs. Goulding* (3 *Code Rep.* 29).

As we have before stated, the referee is placed in the position of the court so far as the decision, judgment and review thereof is concerned (§ 268, 272 and 278).

The words "*or report of referees*," in section 278, it is understood were inserted in the Code of 1849 to obviate the necessity of going to a judge for a direction to enter judgment as required by Justice HAND in *Deming vs. Post*, but that decision was in effect reconsidered in *Van Valkenburgh vs. Allendorf* (4 *How. Pr. R.* 39). After section 278, 268 and 272 had provided for a review in a case tried before a referee in same manner as if tried by the court, it would seem entirely unnecessary to report the words again in section 248.

But in the case at bar there are two other answers to this branch of the defendant's argument.

First, this motion is after judgment; and second, the questions to be reviewed, as appears by the case as settled, are questions of law entirely. It is therefore unnecessary for this court to approve or dissent from the case of *Hastings vs. McKinney* (3 *Code Rep.* 10), decided by the New York Common Pleas, or the case of *Leggett vs. Mott* (3 *Code Rep.* 1), decided in the New York Superior Court.

If the defendants can not review this judgment without an appeal, then they ask to extend the time to appeal. It is conceded that the defendants did not within thirty days after notice of the judgment, in good faith or otherwise, give notice of appeal from the judgment. They did no act except to prepare papers in their office. It is therefore clear that they could not be allowed to

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perfect their appeal under section 327, Laws 1849, page 680. Under that section the court have power to allow almost any amendment provided any step has been taken within thirty days upon which to found an amendment.

That chapter is entitled of appeals in general, and with such broad powers of amendment there given, it is quite evident that the legislature was not intending to apply section 173 to appeals. Laws of 1849, page 650, chapter 6, is entitled "Mistakes in pleadings and amendments." If we are to apply the language "or other *act* to be done" to any thing but the ordinary pleadings and proceedings *in* an action, and to extend it to appeals which are provided for by section 327, then the court can with equal propriety extend the time for commencing a common action beyond six years, as the commencing an action is but an *act* within its broadest sense. The bringing of an appeal is in the nature of a new action. It is not a proceeding *in* an action pending (*Rice vs. Floyd*, 1 *Code Rep.* 112, in Court of Appeals). The case of *Traver vs. Silvernail* was merely a dictum, as will be seen by referring to it.

Before the Code the law was well settled that the courts could not extend the time to appeal. The time allowed for that purpose was regarded as a statute of limitations, and until the legislature clearly gives the court the right to do so, it would be assuming the legislative prerogatives for the court to extend the time to appeal beyond the time clearly fixed by the statute. The right to be *heard before* a judgment shall be pronounced against a party, is an *absolute* right of which a party can not be deprived by the legislature and which will be safely guarded by the courts.

After one trial before a court or tribunal of competent jurisdiction has been had, where the party has had a full opportunity of being heard, to grant him an appeal or a right to review is a matter resting in the sound *discretion* of the law making power, and is one which the party can not claim as an absolute right.

Thus the legislature has absolutely deprived a party from appealing to the Court of Appeals from a judgment in an action originating in a Justice's Court, and he can not even get to the

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Supreme Court in such a case, as a matter of right, but must first obtain a certificate from a justice of that court.

The defendant's motion must be denied with ten dollars costs.

NOTE.—Justice PARKER thought that the court had a right to allow the defendants to amend, by extending the time for bringing the appeal; but the other members of the court were of a different opinion.

5 How. 367—*Contra*, 14 How. 100, 101.

SUPREME COURT.

BLACKMAR agt. VAN INWAGER.

Under the Constitution (*Art.* 3, § 6), the Supreme Court have general jurisdiction in law and equity throughout the state. Therefore, if a motion is heard and decided by the court irregularly, as in a case where an insufficient or no notice of motion has been given, or the papers are otherwise defective, or where the motion is made in the wrong county, the order is not void for want of jurisdiction, but merely irregular; and is binding until vacated or set aside. So held, where upon due notice, an order for a commission was granted to the defendant, by default, in the wrong county.

It seems, that there is nothing in the rules of practice or the statute which requires the motion papers for a commission to state in what county the action is to be tried.

Ontario Circuit and Special Term, Nov. 1850. Motion to set aside inquest. On the 23d September last, at a special term held at Albion in Orleans county, the defendant's counsel, upon regular notice, applied for and obtained an order for a commission to examine a witness in New Orleans, which order contained a provision that all proceedings on the part of the plaintiff be stayed until the return of the commission. The order was duly served on the plaintiff's attorney on the 26th September.

The complaint specified the county of Wayne as the place of trial. Issue was duly joined in the action by reply to the defendant's answer previous to the notice of the motion for the commission. The motion for the commission was not opposed.

The plaintiff's attorney treated the order as a nullity, and having duly noticed the action for a trial and inquest at the circuit appointed in the county of Wayne on the third Tuesday in October last, took an inquest in the cause on Saturday of the first

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1843. The cause was tried and the defendant succeeded at the circuit, which was affirmed by the Supreme Court. The judgment of the Supreme Court was reversed by the Court of Appeals and a new trial ordered; afterwards, and a few months previous to 1850, the defendant Jones died. In April 1845, the defendant Jones conveyed the whole, or some part of the premises in question, to Elisha G. Shipherd who now resides on the said premises. The plaintiff has made a motion to substitute Shipherd in the stead of Jones, as defendant under the 121st section of the Code.

On the part of the defendant it is shown that there is now pending in this court an action of ejectment brought by the plaintiff against Shipherd for the same identical piece of land in which all the same questions will arise as in the suit against Jones.

JOHN BROTHERRSON, *for the Motion*

E. F. BULLARD, *Contra.*

WILLARD, Justice.—At common law this action would have abated by the death of the defendant Jones (2 *Saund.* 72 k; 3 *Bl. Com.* 302). The statute (copied with a slight alteration from 17 *Car. 2d*, ch. 8, § 1,) (2 *R. S.* 387, § 4,) enacts in substance that the death of either party after verdict or plea of confession and before judgment, shall not abate the action, but the court may, within two terms after such verdict or confession, enter final judgment in the names of the original parties. The 121st section of the Code, which is made applicable to suits then existing, as well as those thereafter to be commenced, goes further and declares that no action shall abate by the death, marriage or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, marriage or other disability of a party, it provides that the court on motion, at any time within one year thereafter, or afterwards on a supplemental complaint may allow the action to be continued by or against his representative or successor in interest.

The effect of the continuance of the action against the successor in interest, is to make him liable, in case of a recovery by the plain-

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tiff, for all the costs which had been previously incurred. There is no hardship in this, where a stranger, *after the Code was in force*, makes a purchase of the subject matter in controversy, *pendente lite*. But in the present case the purchase by Shipherd from Jones, the original defendant, was in 1845, three years before the Code was adopted. At the time of his purchase he would not have been made liable for the costs in the suit of the plaintiff against Jones, in case of the death of the latter. He became liable indeed to an action of ejectment, which action was brought and is now pending. It was not competent for the legislature, after the rights of the parties had become fixed, so to alter the law as to subject the purchaser, Shipherd, to the costs of the action against Jones. At the time he made the purchase the law cast upon him no such burthen as is now sought to be imposed upon him. He contracted with reference to the law as it then stood. Had the law remained unaltered he could not have been responsible for the costs of the action against Jones. It is no more within the constitutional competence of the legislature to compel Shipherd to pay the costs of the action against Jones, than it is to compel him to pay any other bill of costs which the plaintiff may have incurred in her numerous actions brought to recover parcels of the Kayaderosseras patent. The 121st section of the Code would not be obnoxious to a constitutional objection, had it been made applicable only to actions commenced after the Code took effect. It is in truth the amendatory act, which applies that section to actions previously commenced, that creates the embarrassment. If the section can be so construed as to refer only to such *transfer of interest* as took place after the Code went into operation, it can be sustained. This construction will give full scope to the section upon all cases brought under the Code, and upon all cases commenced before the Code, where the transfer of interest occurred afterwards.

Under this construction, the plaintiff is not entitled to the relief sought.

There is another ground, too, on which I think the motion should be denied. The plaintiff herself has brought an action

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against Shipherd for the same cause of action for which Jones was sued. That action was probably commenced after the transfer of interest from Jones to Shipherd in 1845. It does not appear when it was commenced. If it was commenced after the death of Jones it would seem to be an election of the plaintiff to abandon that suit, and to resort to a new action. If it was commenced before the death of Jones, the plaintiff can have all the benefits under it, so far as the right to recover the land is concerned, that she possessed under the action against Jones. All she loses is the costs of the suit against Jones. Those she must have lost at common law.

The motion must be denied, but as the practice is new, it must be denied without costs.

SUPREME COURT.

CRANE agt. SAWYER.

Proceedings to compel the determination of claims to real property, *must* be commenced under and in pursuance of the provisions of the Revised Statutes (2 R. S. 313).

The Code (§449) provides that such proceedings "may be prosecuted by action under this act, without regard to the forms of the proceedings as they are prescribed by those statutes," but in its practical operation it can not be done. (*See the reasons by GRIDLEY, Justice.*)

Oneida Special Term, March 1851. Motion to set aside summons and complaint.

MR. FORD, *for the Motion.*

MR. ELWOOD, *Opposed.*

GRIDLEY, Justice.—This is a motion to set aside a summons and complaint served under the 449th section of the Code. This section provides that "proceedings to compel the determination of claims to real property, pursuant to the provisions of the Revised Statutes, may be prosecuted by action under this act, without regard to the forms of the proceedings as they are prescribed by those statutes."

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The proceedings are to be prosecuted by "ACTION," pursuant to the Code. In other words they must be commenced by summons. Accordingly, the summons in this case is made to require the defendant to serve a copy of his answer within forty days after service of the summons; "*or to assert his claim to the premises described in the complaint in the time and manner required by law*, or in default thereof that the plaintiff would apply to the court for relief."

Now, by turning to the provisions in question in the Revised Statutes (2 R. S. 313), we find that the party must serve on the claimant a notice "*subscribed with his name and place of residence*," containing several facts set forth in the statute. Then follow the proceedings, as prescribed by the act, viz., the rule for the appearance of the claimant, judgment for not appearing, plea of disclaimer. And in the event that the person on whom the notice is served claims title in fee, or for life, in possession, remainder or reversion, he then becomes plaintiff in an action of ejectment, and the proceedings are thence forward conducted according to ordinary practice in actions of ejectment.

Now there seems to be insuperable objections to taking these proceedings by action under the Code.

1. Section 127 requires all actions to be commenced by the service of a summons.

2. Section 128 declares that the summons shall require the defendant to appear and serve a copy of his answer, &c., *within twenty days after service of the summons*. The summons in this case gives forty days instead of twenty; and is moreover in the alternative, requiring the defendant to answer, &c., or, "*to assert his claim to the premises in the time and manner required by law*." This is a matter which the statute does not contemplate to be embraced in the summons.

3. This summons is here made to notify the defendant to declare in the ejectment, in the event that he claims title to the premises in question. In other words the complaint which is annexed to the summons and served with it, is to be answered by a complaint of the defendant, who by that means is to become

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plaintiff, and the present plaintiff, defendant. The proceeding then, by action, will involve two actions in which the parties will change places, and the complainant in this suit will ultimately become defendant in the suit to be commenced.

This result shows the absurdity of the proceedings being taken by action, instead of proceeding by notice in the special manner authorized by the Revised Statutes. The summons is prescribed by statute and can not be changed in any important particular without being irregular.

Again, in this particular case there is another objection to the proceeding, independent of the views before given.

The first requisite in section 2 of the provisions of the Revised Statutes, is no where found either in the summons or complaint—the name and place of residence of the party giving the notice, are not given.

The 449th section provides a proceeding by action as a cumulative remedy; so the proceeding under the Revised Statutes is preserved by the 471st section of the Code. This section declares that the Code “shall not affect any existing statutory provisions relating to actions not inconsistent with this act.” The provisions of the Revised Statutes relate to the action of ejectment and provides how the claimant shall become a plaintiff in such action. The 469th section of the Code is inoperative, for the reason that it provides no mode by which its object can be accomplished consistently with the statutory provisions of the Code as to the commencement of suits. The mode prescribed by statute, to compel a determination of claims to real estate, was a proceeding *sui generis*, and it answered the purpose of compelling the adverse party to commence a suit in ejectment. But when the framers of the Code undertook to substitute an action in the lieu of a notice, they prescribed an action to be brought against a party to compel him to commence an action against the plaintiff in the first action. We have then a *complaint* instead of a notice. Now if the defendant desires to contest the title with the claimant, he must serve on the plaintiff, not an answer, but a complaint, in an ejectment cause. Here the plead-

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ings in the first suit cease, so far as depends on the Code, and this first action, instead of resulting in an answer and reply, which is tried and followed by a verdict and judgment, is *merged in* an action brought by the defendant, in which the plaintiff in the first action is miraculously changed into a defendant, and the defendant undergoes a like change of character and appears as plaintiff in a new action. It is seen that the first action has, by this process, entirely disappeared. The object of this proceeding can be obtained by a notice under the Revised Statutes; but I trust I need say no more to satisfy any lawyer that it can not be done by action under the Code, unless an action is a very different thing from what it has been understood to be by the profession. Motion granted.

SUPREME COURT.

THOMAS agt. CLARK AND ROGERS.

Costs given under section 315 of the Code upon motions, the amount of which it is necessary to insert in the order, applies only to collateral motions, such as a motion to vacate or set aside some proceeding, or for relief of some kind, and which are not in the direct and regular progress of the suit, and which are always in the discretion of the court.

It is never necessary to specify the amount of such costs in the orders upon motions which are made in the regular progress of the suit, such as motions in the nature of judgment as in case of non suit, non pros, for a commission, or to change the venue, &c. In these the *statute* gives the costs, not the court. Except that in cases where these motions may be denied for some defect of papers or irregularity, then the costs of denial are to be inserted in the order.

Ontario Circuit and Special Term, Nov. 1850. Judgment as in case of non suit, for not proceeding to trial at the last Wayne circuit, being ordered, the defendants' counsel asks to have the costs of the motion liquidated and inserted in the order; in other words that the motion be granted with costs. The suit was pending before the first day of July 1848.

M. H. SIBLEY, *for the Defendants.*

MR. MCKENZIE, *for Plaintiff.*

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WELLES, Justice.—It is contended on the part of the defendants that the costs of this motion should be given now and the amount inserted in the order; and it is argued that unless it be done there is no way by which the defendants can obtain them, and that they can not be hereafter taxed with the general costs of the defence unless they are first ordered by the court to be paid and the amount liquidated under section 315 of the Code, which is made applicable to existing suits. It is supposed that the case of Doty vs. Brown (4 *How. Pr. R.*), decides the question. The question in that case was what costs the respondent was entitled to; that is, under what law he should recover them; whether under title 10 of the Code, or under the law in force before the first code took effect as a law; and Justice MASON held that it was under the latter. The learned justice in the case referred to, remarks that section 315 is the only one in title 10 which is made applicable to existing suits, and concludes very properly that the only law by which the respondent could recover his general costs, was that in force when the first code took effect, inasmuch as the suit was pending at that time. The particular question now raised does not appear to have been before the court in the case cited. My opinion is that section 315 was not intended and does not apply to motions of this description. That it was designed to provide for cases of collateral motions, such as a motion to vacate or set aside some proceeding, or for relief of some kind, and which were not in the direct and regular progress of the suit; and moreover the costs of which if granted, were collectable, formerly by attachment and now by process in the nature of a *feri facias*, and without regard to the ultimate determination of the suit (*Buzard vs. Gross*, 4 *How. Pr. R.*, 23).

The practice of settling the amount of costs which a party should recover on motion by the court and inserting such amount in the order commenced with the statute of 1840 (*Sess. Laws of 1840, ch. 386, § 15*), which required the justices of the Supreme Court by general rule or order to regulate the amount to be allowed upon granting or denying special motions. The late Supreme Court in pursuance of that statute adopted a general

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rule by which on special motions upon notice, when costs were allowed to the moving party, the whole amount of such costs should be ten dollars, and to the opposing party, where costs were allowed seven dollars; and in peculiar and important cases the costs allowed to either party might be increased to a sum not exceeding twenty dollars (see *Rule 100* of the general rules of the Supreme Court of May 1845). The rule of allowance under the statute was changed by rule 93 of the rules adopted by this court in July 1847. By the Code of 1848, § 270, no costs were allowed on a motion except for resisting in the discretion of the court not exceeding ten dollars. Lastly came the Code of 1849, § 315, which provided that costs might be allowed on motions in the discretion of the court, not exceeding ten dollars. In all these cases where costs were to be allowed in a gross sum to be inserted in the rule, they were always in the discretion of the court, and might be allowed or refused; and if allowed, might be collected forthwith without waiting the determination of the suit; and never were considered any portion of the general costs to be taxed in favor of the prevailing party at the close of the suit. I have never understood any of the regulations by statute or general rule as having any relation to those motions which are in the regular prosecution or defence of the suit, such as motions for commissions, to change the venue, for judgment as in case of non suit and the like, unless where they were denied with costs, as was sometimes the case where the moving party was irregular or moved on defective papers.

My opinion is that it is not necessary or proper to have the costs of this motion liquidated now, or that the rule should say any thing about costs. The defendants have judgment as in case of non suit; and the law, not the court, gives them the costs. The statute of 1840, above cited, shows what items are recoverable as costs of the motion, which go into the general bill and are there to be taxed.

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SUPREME COURT.

In the matter of the SARATOGA AND WASHINGTON RAIL ROAD COMPANY, agt. MCCOY, HODGMAN AND WILLIAMS, Trustees of School District No. 1, in the town of Fort Edward, Washington co.

Opposing affidavits may be read on motion for a common law certiorari.

A certiorari will not lie to the trustees of a school district to review the proceedings of the trustees, or of the district meeting where the remedy is given by appeal.

Whether a motion can be made to quash a certiorari after it is returnable, but before it is actually returned. *Quere.*

A writ of supersedeas may be granted before the return of the certiorari.

Washington Special Term, March 1851. At the special term of this court, in February last, a certiorari was allowed in open court, on the ex parte application of the plaintiffs, directed to the defendants, commanding them to certify the tax list, warrant and apportionment of tax in school district No. I, in Fort Edward, in April 1850, together with the assessment roll, resolutions of said district, records and proceedings upon which the same were founded with all things touching the same, and the mode and manner of making such apportionment, to our justices, &c. at their special term on the second Monday in March next, &c. The error complained of in the affidavit, was that the trustees had made their apportionment according to the town assessment of 1848, in which year the rail road company were taxed for 21 acres of land in said town in one item at \$23,000. That their real estate consisted of the track of their road, about ten acres of which was without the bounds of the said district. The tax assessed by the trustees upon the plaintiffs was \$218.50, which they had paid.

The defendants moved to quash or supersede the certiorari. They deny that the apportionment of the district tax in question was based upon the assessment roll of 1848, because in that year the rail road company were not taxed at all, but on the assessment roll of 1849; and they admit that they made a mistake in assessing the company upon the whole sum at which they were taxed

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in the town, without deducting the value of their real estate in said town, out of the bounds of the said district. This error made the tax of the rail road \$38.23 too much; on discovering which, and after it had been paid by the company, they obtained the advice of the superintendent of common schools to correct the said tax list according to the statute, and refunded the said money thus erroneously collected from the company. There are some other facts stated in the affidavit on which the certiorari was allowed, which are controverted in the moving papers, but they are not necessary to be stated.

WAIT & PARRY, *for the Motion.*

W. L. F. WARREN, *Contra.*

WILLARD, Justice.—The certiorari in this case was granted upon an ex parte application. Had notice of the motion been given, the defendants could have successfully opposed it on the affidavit upon which the present motion is founded. Opposing affidavits may be read in opposition to a motion for a common law certiorari (1 *Hill*, 195; 2 *do.* 398). The case of Commissioners of Highways of Warwick vs. The Judges of the Orange County Courts (9 *Wend.* 434), was probably misreported, so far as it contains any different doctrine.

The trustees of the district were authorized by law to correct the error in the tax list and to refund the money improperly collected on it (*L. of* 1843, *p.* 165, § 13). After such correction and refunding the money, the plaintiffs had no reason to complain of the assessment; and there no longer remains any occasion to review the proceedings on certiorari. All this had been done before the certiorari was allowed.

But there is still another reason for quashing the writ. It was held in *Slocum vs. Odell* (2 *Wend.* 287), that a certiorari will not lie to the trustees of a school district to review the proceedings of the trustees or of the district meeting, because those proceedings could be corrected on appeal, under the law of 1827, to the commissioners of common schools of the town in which the district is situated. That case is approved in 2 *Hill*, 27, and the general

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principle is affirmed that where a remedy is given by appeal a certiorari should not be granted. Under the Revised Statutes (1 vol. 487, § 169,) an appeal in this case was given to the aggrieved party from the decision of the school district or their trustees to the superintendent of common schools; which appeal by the 7th section of the Laws of 1833, p. 164, was required to be first presented to the county superintendent, whose decision might be reviewed on appeal to the superintendent of common schools. The rail road company, therefore, had an ample remedy without resorting to a certiorari.

It has been objected that the present motion can not be entertained because the certiorari has not been returned, although it is returnable. In the *People vs. The Judges, &c.* (4 *Cowen*, 73), the same objection was taken to a motion to quash an alternative mandamus; and although it was stated by the court that a motion to quash the writ will not in general lie till it is returned, the decision of the cause did not turn upon that point. But in *Ferguson vs. Jones* (12 *Wend.* 241), a motion was made to quash a certiorari *not then returnable*. It was held that although the motion was premature, the party might take a rule under the general clause of his notice, to supersede it, and it was superseded accordingly. In that case the motion was made at the November special term, and the writ was not returnable until the January term following. This case contains a strong implication that the motion may be made to quash, after the writ is returnable, though in fact it is not returned. Be that as it may it is directly in point that the writ may be superseded, under a notice like the present.

The same purpose will be accomplished by a writ of superseas, as by an order to quash. It is therefore ordered that a writ of superseas issue to the writ of certiorari in this case tested the 17th day of February 1851, and allowed in open court at the Washington special term on that day; and it is further ordered that the plaintiffs pay to the defendants ten dollars for the costs of this motion.

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SUPREME COURT.

PARK agt. CHURCH AND ATWELL.

Where a confession of judgment commenced with the title of the cause, and then proceeded thus, "judgment is hereby confessed in this cause for the sum of \$1413," &c.; the statement being signed and sworn to by the defendants, *Held*, that it was a sufficient authority under the Code (§ 383, 1 *sub.*) to enter judgment. This part of the statute is directory merely. One year bars all relief for irregularity in entering judgment (2 R. S. 282, § 2).

Where an execution contains all the requisites specified in § 289 of the Code (which prescribes the form), it is sufficient. Therefore, objections that it is not issued "in the name of the people," nor "tested in the name of the Chief Justice or any Judge," and is not, "on its face made returnable within sixty days," are unavailable, where there is an endorsement on the back directing the sheriff to return it in sixty days.

Where the vendor of a store of goods took from the vendees a judgment to secure a part of the purchase money and entered into a written stipulation not to issue execution thereon in five years, "unless upon an actual examination of the books, accounts of sale, and business of the said parties of the second part (the defendants), in their store aforesaid, he shall have good reason to deem himself insecure," and about one year afterwards the plaintiff being informed that the defendants were about making an assignment, and learning from one of them that they had consulted counsel about it, and did not know but they should do so before going to New York, that they had got so deeply in debt, and insolvent, that they were not or should not be able to pay their debts; that they owed," &c. And that on the same day the plaintiff with the sheriff, who had the execution, went to the store, found it closed, and the defendants with their counsel within it engaged in writing, and declaring that the assignment had been made some three or four hours previous, but which in fact appeared not to have been made until after the levy by the sheriff on the execution. *Held*, that the plaintiff was excused from a *literal* compliance with the conditions of the stipulation, as to the examination of the books, &c. of the defendants. The substance of the condition was that the plaintiff should have good reason to believe himself insecure.

Oneida Special Term, April 1851. Motion to set aside an execution.

CH. H. DOOLITTLE, *for Defendants.*

S. CRIPPEN, *for Plaintiff.*

GRIDLEY, Justice.—It appears from the papers used on this motion, that a judgment was confessed to the plaintiff on the 16th

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day of March 1850, for the sum of fourteen hundred and thirteen dollars, for the purpose of securing a balance of that amount, due on the purchase of a store of goods bought by the defendants of him. On the 29th of March 1851, an execution was issued on the judgment and levied on the goods in the store. This motion is made to set aside the execution upon several grounds.

1. It is said that there was an irregularity in the confession of judgment. The particular irregularity relied on is that the confession does not contain any authority to enter judgment pursuant to the first subdivision of section 383 of the Code. The confession of judgment commences with the title of the cause, and then proceeds thus; "judgment is hereby confessed in this cause for the sum of \$1413" &c. It is difficult to state the authority in a more direct manner than is done here; especially when we remember that the defendants both swear to this statement, and that in every other respect the confession is admitted to conform to the statute. Again, this part of the statute is directory merely, and the defendants can not be heard to object to it, especially after the lapse of more than a year; one year bars all relief for irregularity (2 R. S. 282, § 2; see also *Griffin vs. Mitchell*, 2 Cow. Rep. 548).

2. There are several objections made to the form of the execution. It is said that the execution is to be deemed process of the court by section 286 of the Code; and that by the eighth section of title 1 ch. 3 part 3 of the Revised Statutes (2 R. S. 275, § 8), it is provided that all writs and process shall be in the name of the people of the state. It is further urged that the process should be tested in the name of the chief justice or senior judge of the state (2 R. S. 198, § 10), and that by section 290 of the Code, the execution should be returnable within sixty days after its receipt by the sheriff. The execution in this case is not in the name of the people, is not tested in the name of any judge, and is not on the face of the process made returnable within sixty days, but on the back is endorsed a direction to the sheriff to return the same in sixty days.

It is to be remarked that the execution contains all the requi-

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sites specified in the 289th section of the Code, which prescribes the form of the execution. This, the counsel for the plaintiff argued, is enough; and it must be confessed that such an interpretation seems to be in accordance with the spirit of the Code. The revisors in a note to the chapter on executions say that "a revision of the forms of execution then in use is the necessary result of abrogation of those forms; and that in accomplishing this end they have aimed at retaining any necessary feature of final process and nothing more; that the execution is a direction to the sheriff to execute the judgment of the court and should inform him what that judgment is, the place where it is to be found, the time from which it is a lien, the names of the parties, and whether it is to be executed on the property or person of the defendant (*Revisers' Rep.* 197). So too, Mr. Monell, in his book on practice (*Monell's Pr.* 221), holds a similar opinion; he says "formerly an execution issued out of the court was, under seal, tested in the name of the chief justice or first judge, and was subscribed by the clerk. All these formalities are now dispensed with, and the execution is a simple direction to the sheriff or other officer, requiring him to collect the judgment or deliver the real or personal property, according as the judgment is." It is true that the execution is still deemed the process of the court in one sense. It is not the mere direction of the attorney who issues it; but in all other respects the Code itself prescribes what its contents shall be in section 289, before cited. When the Code declares in terms what it shall contain and the execution conforms to the rule prescribed by the statute, it is difficult to say that the process is not warranted by the Code. I am still of opinion that the form of execution given by Mr. Monell in his forms (*Monell's Pr.* 487), is preferable to the form adopted in this case. But that is a matter of taste only, and we can not condemn a form which follows the direction of the statute and contains all that is required by it. But if the rule were otherwise, and if we were now under the old practice, the defects alleged against this execution are all amendable, and can be amended on this motion (1 *Cow.* 199; 4 *Cow.* 158; 3 *Cow.* 39, 42).

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3. But the main ground on which this motion is pressed upon the court arises out of a stipulation entered into by the parties, when the judgment was confessed. This agreement recites the sale of the goods, the securing of \$600 by a mortgage on real estate, and the residue of the purchase price by the judgment confessed; the plaintiff then "agrees to give the defendants five years to pay the said mortgage and judgment, and not to issue execution on his said judgment against the said parties of the second part unless upon an *actual examination of the books, accounts of sale, and business of the said parties* of the second part, in their store aforesaid, *he shall have good reason to deem himself insecure.*" The defendants complain that the execution was issued without any examination of their books, or accounts, or any request by the plaintiff to see them. This allegation is admitted by the plaintiff; but he states as his excuse for issuing the execution without such examination, that on the 29th of March last he was informed by a neighbor that the defendants were about to fail and to make an assignment, and unless he proceeded without delay it would be too late to secure his debt, and his demand would be lost. In order to get an execution and a sheriff to serve it, he was obliged to go about seven miles to his attorney's residence, and then to Cooperstown, a distance of about eleven miles, to find a sheriff, and that he returned towards night and before the sheriff; that after he returned and before the sheriff arrived, he saw Mr. Church, one of the defendants, and informed him that he had heard that the defendants were going to make an assignment; to which the defendant Church replied that he had consulted Messrs. Gorham & Foster (the attorneys and counsel of the defendants) about making an assignment, and he did not know but they should do so before going to New York; that they had got so deeply in debt, and insolvent, that they were not or should not be able to pay their debts; that they owed \$2000 in New York, \$800 money borrowed about home; that they had a bank note that would fall due on the 9th of April which they could not meet without borrowing the money. It appeared that the store was soon after closed, and when the plaintiff and the sheriff

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entered at about 8 o'clock in the evening, they found the defendants and Messrs. Gorham & Foster and one Mattison there; Foster was writing at the desk; Gorham claiming that the assignment had been made three or four hours before, and Foster saying it had been made about one hour before. The plaintiff states as a matter of fact that there was an assignment actually made on that night, although he does not say it was before the levy of the execution. In addition to this, the attempt to keep the plaintiff and the sheriff out of the store, and the suspicious conduct of the parties in the store, and the total omission of this whole subject in the affidavits of the moving party, tend to confirm the belief that the levy was made before the assignment was executed.

Upon this state of facts the plaintiff was excused from a *literal* compliance with the conditions of the stipulation before mentioned. The substance of the condition was that the *plaintiff should have good reason to believe himself insecure*. Of that fact he was fully informed by the defendant Church, before the levy was made.

Again, it is entirely clear that had he gone and made his examination of the books before he went after the execution and the sheriff, the assignment would have been made, before he could have got an execution levied, and his demand would have been lost. Another reason why the plaintiff is relieved from the necessity of making an examination of the defendants' "*books, accounts and business*," is the undeniable evidence of their bad faith. It was a part of the stipulation above referred to that they should not "remove the goods from the store." There was a strong implication that those goods, or their proceeds should be applied to the payment of the plaintiff's judgment. Hence, the prohibition on the defendants from removing the goods, and the right reserved to levy if on examination he should feel himself insecure. Now when he found the defendants in the very act of disposing of their entire property, by assignment, *they* were guilty of the *first breach of the stipulation*, and they can not complain if they were defeated in their dishonest attempt by his superior

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diligence. Doubtless it would have given the defendants an opportunity to assign their property, if the plaintiff had gone through the then useless ceremony of an examination of their books before he levied, but I am satisfied that he was under no such obligation.

5 How. 386—FOLLOWED, 7 How. 360, 363. OVER-
 RULED, 16 Id. 78. See 7 Id. 367, 368.

SUPREME COURT.

CONKLIN AND CONKLIN agt. DUTCHER.

Where an *affidavit* for an attachment under § 227, 8 and 9 of the Code, sets forth enough to call upon the officer for the exercise of his judgment upon the weight and importance of the evidence stated, it is sufficient to give jurisdiction.

An attachment can not be superseded or set aside on special motion, upon affidavits which go only to contradict or disprove the facts contained in the affidavit upon which it was granted; or, in other words, upon the merits.

It is not necessary to state in the affidavit for an attachment, that a summons has been issued.

An undertaking in the form of a penal bond is good, where it contains the conditions provided by the Code (§ 230).

No appeal will lie to a justice of this court, at special term, from an order of a county judge granting an attachment. The latter acts as a justice of the Supreme Court at Chambers, and his orders are to be reviewed in like manner (§ 403).

The only mode of getting rid of an attachment, improvidently issued, is by applying to the judge to vacate his own order (§ 324), or by appeal to the general term (§ 349). But in neither case can opposing affidavits be used by the defendant nor additional affidavits by the plaintiff.

Motions to set aside attachments for *irregularity* merely, may of course be made at special terms.

General Term, July 1850. This is an appeal from an order made at a special term denying defendant's motion to set aside an attachment, issued pursuant to sections 227, 8 and 9 of the Code. The motion was founded on several distinct grounds. 1st. That the affidavit was insufficient. 2d. If sufficient, then the defendant offered his opposing affidavit disproving the facts set forth in the plaintiffs' affidavit on which the attachment issued. 3d. That the attachment was issued before the summons was issued. 4th. That the undertaking was in the form of a penal

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bond and that it did not provide for costs, &c. 5th. That it was not acknowledged or proved in the manner directed by the 76th rule of this court.

By the Court, SHANKLAND, Justice.—1. The facts set forth in the plaintiffs' affidavit to procure the attachment, were entirely sufficient to entitle them to that process. The rule is that if enough is set forth in the affidavit, to call upon the officer for the exercise of his judgment upon the weight and importance of the evidence, it is sufficient; it is only where there is a total want of evidence upon some essential point, that the officer will fail to acquire jurisdiction (4 *Hill R.* 602; 20 *W. R.* 77). The facts in this case are stronger than in the cases cited, to warrant this process.

2. The defendant's affidavit to falsify the facts contained in the plaintiffs' affidavit should not be received. No provision is made by the code for superseding the attachment in this manner; and the well settled rule, independent of any statutory provision, is not to receive contradictory affidavits on questions like this. It is so, on attachments issued by justices (9 *J. R.* 130), even where it is attempted by plea in abatement of the process. So, on questions of holding to bail (4 *Vesey, Jr.* 590; 2 *East. R.* 453; 16 *M. & W.* 196; 12 *Price R.* 194; 1 *Excheq. R.* 436; 3 *Barb. S. C. Rep.* 229; 3 *How. Pr. R.* 265).

The code in allowing this process, evidently intended it as in the nature of bail; and the defendant can at any time before final judgment, get the property discharged, by giving an undertaking for the payment of any judgment which may be recovered (§240, 241). The entire omission of any other mode of discharging the attachment, is quite conclusive that the legislature did not intend that conflicting affidavits should be received for that purpose; especially as they have carefully provided for the reception of such affidavits in two of the provisional remedies in this same code. In the cases of arrest and bail, sections 204 and 205, provide, "that a defendant arrested, may at any time before the justification of bail, apply on motion to vacate the order of arrest, or to reduce the amount of bail; and if the motion be made upon

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affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proofs, in addition to those on which the order of arrest was made. Similar provisions are made, by which to get rid of injunction orders, by sections 225 and 226. Like provisions were made by the 45th and 46th sections of the absconding debtor act (2 R. S. 70, 3d ed.).

3. The affidavit of the plaintiffs' attorney, read in opposition to this motion at the special term, proves that the summons was in fact issued previous to the issuing of the attachment; and as it was not necessary for the plaintiffs to state, in their original affidavit for this process, that a summons had been issued, it was in time to show that fact in opposition to this motion.

4. The undertaking in the form of a penal bond, is good as an undertaking under the code, as no particular form is prescribed for such an instrument. The conditions of this bond of undertaking are all that the code requires. Both damages and costs are provided for, and the penalty is in the sum of two hundred and fifty dollars (§ 230).

5. But the undertaking was not proved nor acknowledged before the same was received by the county judge as required by the last clause of rule 76th of this court. But it is a defect which can be supplied, and we should permit it to be done on payment of costs, if we can take cognizance of this motion on appeal.

A careful examination of the code has forced me to the conclusion that not one of the five questions involved in the motion at the special term, are brought here by this appeal. Section 349 and its several subdivisions, are the only provisions to which the parties can look for the right of appeal from orders made by a single judge. This is not an appeal from the order of Judge Hyde, granting the attachment, but it is an appeal from the order of Justice Monson, refusing to set aside said attachment. If an appeal had been made from Judge Hyde's order *granting* the attachment, the case would have been within the first subdivision of section 349, which allows an appeal from an order *granting* or *refusing* a provisional remedy. But justice Monson neither *granted* or *refused* a provisional remedy. He merely refused to

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interfere in the matter; and I doubt his power to have interfered with that question. No appeal lay to him, at special term from the order of Judge Hyde. The latter, in making the order in question, was acting as a justice of the Supreme Court at chambers, and his orders are to be reviewed in the same manner (§ 403). Justice Monson had the questions of the irregularity, in issuing this attachment, properly before him, but not the question whether the facts on which Judge Hyde granted the attachment were sufficient to warrant the attachment. That question can come up only by appeal from the order of Judge Hyde.

The defendant against whom an attachment has issued has two modes of getting rid of it, where it has been improvidently granted. 1st. By applying to the judge to vacate his own order (§ 324); and 2d, by appeal to the general term under § 349, subdivision one. But in neither mode can opposing affidavits be used by the defendant, nor can additional affidavits be used by the plaintiff. In this case the defendant has pursued neither of these modes, and is without remedy.

In the case of *Morgan vs. Avery* (2 Code Rep. 91), Mr. Justice EDMONDS, held that the propriety of issuing an attachment under the Code may be tested by motion at special term, and that *additional* affidavits may be there used by the plaintiff, and *opposing* affidavits read by the defendant. His opinion proceeds upon the ground, in some measure, that an appeal would not lie from the granting the attachment, because it is by *warrant*, and not by *order*. But section 400 enacts that "every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an *order*. The warrant of attachment, signed by the judge, or his allowance endorsed thereon, is clearly a "*direction in writing*," within the above definition of an *order*. Section 400 was probably overlooked by the learned justice, in the above cited case of *Morgan vs. Avery*. I am therefore of opinion that we have not the question before us, whether the original affidavit on which Judge Hyde acted in granting the attachment, was sufficient or not; and that the other questions disposed of on the special motion, are not appealable, and that this appeal should be dismissed without costs.

The Oswego and Syracuse Plank Road Company agt. Rust and Rust.

SUPREME COURT.

THE OSWEGO AND SYRACUSE PLANK ROAD COMPANY agt. RUST AND RUST.

The general allegation in a complaint, "that the plaintiffs are an incorporated company, organized pursuant to the provisions of the act," &c. (describing it), is sufficient to show a legal incorporation.

Subscribers to a stock subscription admit the legal existence of the corporation by their subscription, and can not question its capacity to appear upon the record.

The allegation, that the defendants subscribed to so many shares of stock, legally implies that they were the owners of and entitled to those shares; and renders a specific allegation of *consideration* by virtue of the subscription unnecessary.

Oswego Circuit, November 1850. This was a demurrer to the complaint. The complaint is as follows: "The Oswego and Syracuse Plank Road Company plaintiffs, by Ransom H. Tyler, their attorney, complain of Charles Rust and Spencer Rust defendants, for this, to wit: That the plaintiffs now are and have been ever since on or about the 28th day of December 1848, an incorporated company, organized pursuant to the provisions of the act of the legislature, entitled "an act to provide for the incorporation of companies to construct plank roads, and of companies to construct turnpike roads, passed May 7, 1847," and the acts amending the same. That, as the plaintiffs are informed and believe, in contemplation of the organization of said company, to wit, on the 21st day of December 1848, upon due notice, subscription books were opened, as required by law, and the defendants subscribed to the capital stock of said company twenty shares, amounting to \$500 (said shares being \$25.00 each), and thereby agreed to take twenty shares of the said stock, and promised to pay the same to the directors of said company at such times and places as said directors should from time to time direct. That as plaintiffs are also informed and believe, pursuant to due notice, the subscribers to said capital stock, met at the Fulton House in the village of Fulton, on the 28th day of December 1848, and elected directors, adopted articles of association, and organized said company, and then and there said defendants again

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subscribed twenty shares of said stock, amounting to \$500, and thereby agreed to pay the same to the said directors (except five per cent thereon, which had been paid to said directors), at such times and places as said directors should from time to time direct. The plaintiffs upon their information and belief, further say that the requisite amount of the capital stock of said company was in due time subscribed, and five per cent paid thereon, and that said directors required the whole of said capital stock subscribed to be paid by instalments until the whole thereof should be paid; the last of which instalments was required to be paid to the treasurer of said company at Fulton, on the first day of August 1849, which requirement of said directors was published as required by law. The plaintiffs upon their information and belief, further aver that said defendants have paid upon said subscription, in all, only the sum of \$25, and that the sum of \$475 is now actually due thereon, with interest from the first day of August 1849.

Whereupon the plaintiffs demand judgment against said defendants for said sum of \$475, with the interest thereon from August 1, 1849."

The defendants demurred as follows: "1. Because it appears, on the face of said complaint, that this action is brought to recover the amount of a voluntary subscription for the balance of twenty shares of capital stock of said Plank Road Company, amounting to \$475.

2. Because it does not appear on the face of said complaint that there was any consideration for said subscription, or for defendants, promise to pay said subscription or any part thereof.

3. Because it does not appear upon the face of said complaint that the plaintiff has any cause of action against defendants, nor does it show any legal liability of defendants to the plaintiffs.

4. The complaint does not show upon the face thereof that said company has any legal existence."

R. H. TYLER, *for Plaintiffs*.

R. H. GARDNER, *for Defendants*.

HUBBARD, Justice.—The demurrer may be stated in two points.

1. That the complaint does not show that the plaintiffs were duly

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incorporated. And 2d. There is no allegation of consideration for the subscription to stock in the plaintiffs' road.

The complaint alleges generally the incorporation of the plaintiffs pursuant to the provisions of the act passed May 7, 1847. This is sufficient for any purpose; but even that, I think, was unnecessary in this action. The defendants by subscribing for stock have admitted the legal existence of the plaintiffs as a corporation, and can not question their capacity to appear upon the record. This principle was distinctly decided in the case of the Dutchess Cotton Manufactory vs. Davis (14 *John*. 238; see *opinion*, p. 245). That case was in relation to a stock subscription and hence strikingly analagous to this.

Upon the second point of demurrer, I have had more doubt; but I have come to the conclusion that the complaint is sufficient for the following reasons; 1. That it contains allegations of every fact essential to be proved to support the action. It alleges the corporate existence of the plaintiffs, the defendants' subscription to twenty shares of capital stock, the payment of the five per cent, and the call of the directors for the payment of the balance. The proof of these facts would show a case for a recovery, *prima facie*. 2. It is unnecessary to allege specifically that the defendants, by virtue of their subscription, became entitled to twenty shares of the capital stock of the company. The legal implication from the facts alleged is that the defendants were entitled to those shares. The company was organized, as appears from the complaint, for the purpose of constructing a plank road and reaping the pecuniary advantages to toll. By the provisions of the act the subscribers became a body corporate for the purpose of constructing and owning a plank road. How can the subscriber be an owner, except through and to the extent of his subscription?

The shares subscribed are deemed personal property and may be sold as such and reached by judgment creditors. To allege, therefore, that the defendants subscribed to so many shares of stock, is in legal effect an allegation that it was done upon the consideration of the ownership of those shares. It can not be seriously urged that the defendants intended to make a gratuitous

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subscription. The contrary, I think, is clearly inferrible from the complaint. The case of the Trustees of Hamilton College vs. Stewart (1 Cow. 581), can have no application. The contract in that case was clearly without consideration. The corporation undertook to do no act as a condition for the subscription, neither was there any possible pecuniary benefit to result to the defendant.

The plaintiffs are entitled to judgment on the demurrer, but the defendants are at liberty, on payment of costs of demurrer, in twenty days after service of notice of this order, to answer the complaint.

5 How. 398—*Contra*, 6 How. 172; 9 Id. 485.

SUPREME COURT.

CALKINS agt. WILLIAMS AND BRAND.

Public officers, sued as such, where they succeed in the action, are entitled to *double costs* under 2 R. S. 617, § 25. The Code has not repealed that provision. (*There are adverse decisions on this point. See 4 and 5 How. Pr. R.*) Such costs can not be allowed upon a report of referees; it is only in cases of verdict, demurrer, non suit, non pros or discontinuance (2 R. S. *supra*).

Madison Special Term, February 1850.

Z. T. BENTLY, *for Plaintiff.*

WM. J. HOUGH, *for Defendants.*

MASON, Justice.—The defendants are public officers and have defended the action successfully, and now ask for double costs under the statute (2 R. S. 617, § 25). There can be no doubt in this case but the defendants would be entitled to double costs in this action if this were a judgment upon a verdict, unless this statute is repealed by the Code of procedure, which I am inclined to think it is not. These double costs are given to the officer himself by the express provisions of the statute (2 R. S. 617, § 26; 6 Wend. R. 297); and the statute is explicit that the attorney and counsel shall not be entitled to but single costs (2 R. S. *supra*). It may be laid down as a general rule that it is deemed

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against the policy of the law to favor repeals by implication (*Smith's Con. Statutes and Constitutional Law*, 879); and if by any fair interpretation the two statutes may stand together they shall so stand; and Smith says when it is not manifestly the intention of the legislature that the subsequent statute shall repeal the former, it is the duty of the courts to give them such constructions as will uphold them both, even though the words taken strictly might seem to repeal the former act (*Smith on the Construction of Statutes*, 879); applying this rule to the case under consideration, I do not think it would be safe to hold that the statute giving to a public officer double costs for defending, is to be deemed repealed by the Code of procedure.

I know that the 303d section of the Code abolishes all statutes establishing or regulating the costs or fees of attorneys, solicitors and counsellors in civil actions, and gives in the place thereof a certain allowance to the party by way of indemnity for his expenses in the action and which allowances are termed costs and go to the party and not the attorney or counsel in the suit; and the 307th section of the Code provides that when costs are allowed they shall be as regulated by that section; but I am not able to discover any thing in those sections which by implication even can be said to repeal the 25th section 2 R. S. 617, and I can not think the 468th section of the Code, which repeals the statutory provisions inconsistent with that act, is to be considered as having this effect. The statute was passed to afford some indemnity to public officers for their trouble and expense in the defence of suits improperly brought against them; and there is the same reason for the statute now that there was before the passage of the Code of procedure; and I can not think, after a careful examination of the provisions of the Code and the best reflection which I have been able to bestow upon the subject, that it was the intention of the legislature to repeal this statute. It has never been considered that the change of the general fee 'bill of costs operated as a repeal of this statute in favor of officers.

The statute of 1840, which changed entirely the general fee bill of attorney and counsel, was never considered to have such

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effect. We can not, however, give these defendants double costs upon this report of the referee. The statute only allows it upon verdict, demurrer, non suit, non pros or discontinuance (2 R. S. 617, § 25); and it has been expressly adjudged that a report of referees is not within the terms of the statute, and that double costs can not be allowed upon a report (19 W. R. 225).

The defendants also ask for an additional allowance under the 308th and 309th sections of the Code; and I am satisfied, after a careful examination of the papers before me upon this motion, that this is a proper case to allow the defendants a per centage, upon the value of the property claimed by the plaintiff and which was the subject of litigation in this action.

The amount is stated in the referee's report at \$840.17, upon which sum I order and direct that defendants recover five per cent to be added to the defendants' costs and inserted in the record by the clerk with the other costs of suit.

SUPREME COURT.

5 How. 395—*Contra*, 9 How. 465.

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MASON, Justice.—This is a motion like the above, and the defendants can not have double costs for the reason stated in my opinion in the other case, but the defendants are to have an allowance of five per cent upon \$519.54, to be added to their costs of defending and inserted on the record; and as the defendants have moved for double costs, to which they are not entitled, and have put the plaintiff to the expense of opposing this motion, I am inclined not to give the party any costs on these motions.

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Livingston and Mitchell agt. Cleaveland.

SUPREME COURT.

LIVINGSTON AND MITCHELL agt. CLEAVELAND.

The Code (§ 290) requires that "the execution shall be returnable within sixty days after its receipt by the officer," &c. Upon the proper return of the execution, therefore, by the sheriff at *any time within* the 60 days proceedings supplementary to execution (in the nature of a creditor's bill) may be commenced.

Prior to the act of 1840 executions were made returnable on a particular day in term. And by the act of 1840 they were made returnable sixty days from the receipt thereof by the sheriff. A creditor's bill could not properly be filed in such cases until after the *return* day.

Chenango General Term, January 1851. MASON, SHANKLAND and MONSON, Justices.

SEDGWICK & OUTWATER, for Plaintiffs.

DILLAYE & THORN, for Defendant.

By the Court, MASON, *P. J.*—The case comes before the court on an appeal from an order appointing a receiver on proceedings supplementary to the execution. The only objection to the order is that the execution was returned, and these proceedings instituted before the expiration of the sixty days, and consequently that these proceedings were prematurely commenced, and that the order based upon them is erroneous. The counsel for the appellant insists that these proceedings supplementary to the execution are but a substitute for the creditor's bill under the old practice, and that the decisions of the late chancellor in the cases of *Cassidy vs. Meacham* (3 *Paige R.* 311), and *Williams vs. Hogeboom* (8 *Paige*, 469), are decisive of the case under consideration. These cases hold that a creditor's bill could not be filed until after the return day of the execution issued upon the complainant's judgment, although the execution should be actually returned before that time. The 41st section 2 R. S. 174, which allowed the filing of a creditor's bill whenever an execution against the property of the defendant shall have been issued on the judgment at law and shall have been returned unsatisfied, in whole or in part, is substantially the same as section 292 of

the present Code, which allows these proceedings supplementary to the execution whenever an execution against the property of the judgment debtor shall be returned unsatisfied, in whole or in part. The filing of the creditor's bill under the former statute, required that the plaintiff should exhaust his legal remedies before he should be allowed to come into a court of equity and invoke the aid of the court in divesting the debtor of his property by a summary appointment of a receiver; and the present Code of procedure, as prescribed by this 292d section, contemplates that the judgment creditor shall in like manner exhaust his remedy at law by the issuing and return of an execution upon his judgment at law before he shall be allowed to institute the severe and summary proceedings allowed by chapter 2 title 9 of the Code. And the chancellor held, in the cases above referred to, that this relief in equity by creditor's bill should not be allowed until there was a fair exhaustion of the legal remedies upon the judgment, and that such legal remedies were not exhausted when the execution was returned before the return day thereof.

This rule is undoubtedly applicable to the proceedings supplementary to the execution under the 292d section of the Code, and the above cases decided by the late chancellor, are controlling authority under the present practice allowed by the 292d section of the Code, unless the change of our statute in relation to the form and return of the execution shall be deemed to have rendered those decisions inapplicable to the present practice. It should be borne in mind that prior to the statute of 1840 (*Laws of 1840, p. 334, § 24*), writs of execution were only made returnable in term time, and were required to be made returnable on a particular day, and by the said 24th section of the statute of 1840 such writs were required to be made returnable sixty days from the receipt thereof by the sheriff. It will be seen, therefore, that by the very frame of the execution under these former statutes, that the writ contained no mandate to the sheriff to return it in the one case till the actual return day thereof, and in the other until the end of sixty days from the receipt thereof by the sheriff; and that consequently the sheriff may well be said

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to have returned the execution prematurely, if he returned the same before the return day named in the one case, and before the expiration of the sixty days in the other. The 244th section of the Code of procedure of 1848 (*Laws of 1848, p. 542*), which prescribed the form of the execution, was entirely silent as to the return day thereof, but the 245th section provided that the sheriff should in all cases return the execution within sixty days after its receipt. The omission in the act of 1848 is provided for by the amended Code of 1849 (*Laws of 1849, p. 672, § 289 and 290*), which requires the execution to contain the mandate that it shall be returned within sixty days from the receipt thereof by the sheriff. The mandate of the execution under the Code of 1849, therefore, requiring the sheriff to return it within sixty days, and he might consequently legally return it at any time within the sixty days, whenever he had made diligent search for property and became satisfied that the defendant had not property to satisfy the same, or any part thereof; and the day on which the sheriff should make such a return may well be regarded as a proper return day of the execution. It follows, therefore, that as we are to presume that the sheriff has done his duty in searching for property when he has made his return of nulla bona, that we must regard the legal remedies of the plaintiffs as exhausted before these proceedings supplementary to the execution were instituted. If I am correct, therefore, in the views above expressed, this order must be affirmed; and I see no reason why the respondent should not have his costs upon the appeal. The order, therefore, is affirmed, with ten dollars costs.

SUPERIOR COURT.

PATON AND PATON AND STEWART agt. WESTERVELT, late Sheriff.

Under the 5th article, title 3, chap. 8, 2 R. S. 398, which treats of proceedings to perpetuate testimony; it must be made to appear to the officer, before whom an application is made for the examination of witness, that the object is in good faith to *perpetuate* testimony.

At Chambers, December 4th, 1850.

CHARLES H. SMITH, *for Plaintiffs.*

N. BOWDITCH BLUNT, *for Defendant.*

CAMPBELL, Justice.—An application was made to one of the justices of this court for an order to examine certain witnesses on the part of the plaintiffs. The order was granted upon an affidavit setting forth that a suit was pending between the parties and at issue, and that the testimony of the witnesses was material and necessary.

On the return of the order the counsel of the defendant appeared before me and objected to such examination on the ground that the cause was at issue and ready for trial, and it did not appear that the witnesses were aged or infirm, or sick, or were about to leave the state. This was admitted by the plaintiff's counsel, but he insisted that under the 5th article, title 3d, chap. 8, 2 R. S. 398, he was entitled to the examination of the witnesses. The affidavit is sufficient under the provisions of that article to authorize the granting of the order and the party would be entitled to have the witnesses examined, provided that it was made to appear to the officer that the object was to *perpetuate* the testimony. That article treats of "proceedings to *perpetuate* testimony" and is a reenactment in part of the old law (1 R. L. 455), which provided a means for perpetuating testimony where the controversy related to real estate. It has been extended in the Revised Statutes to all controversies; but it is very evident from an examination of the whole title that it was not contemplated to apply to a case such as is before me, for the first article in the same chapter and title page 391, provides for "taking conditionally

Mechanics' and Farmers' Bank agt. Rider and Wilbur.

SUPREME COURT.

THE PRESIDENT, &C., OF THE MECHANICS' AND FARMERS' BANK, OF
THE CITY OF ALBANY, agt. RIDER AND WILBUR.

Under the first clause of § 397 of the Code, *any party to any action may be examined as a witness on behalf of any other party—a plaintiff for his co-plaintiff, and a defendant for his codefendant, upon joint contract or otherwise.*

The court must discriminate and restrict the testimony offered to its proper office, so that it shall not be used on behalf of the party examined.

PARKER, *Justice, dissenting, holding that upon a joint contract, where the defence was joint, a separate judgment could not be rendered, and therefore a defendant could not be examined on behalf of his codefendant as to such joint defence. See the case of Selkirk agt. Waters, ante page 296, and also the dissenting opinion in this case.*

Albany General Term, May 1851. This action was brought to recover the amount of a promissory note for \$7000, signed by the defendants jointly, dated June 12, 1848, and payable to the order of the plaintiffs' cashier, four months after date. The defence was usury. The cause was tried at the Albany circuit in June 1849, before Mr. Justice PARKER. Upon the trial, each defendant offered his codefendant as a witness to prove all the facts stated in his answer. The plaintiffs' counsel insisted that the defendants, being joint contractors, were incompetent witnesses for each other, and the court so decided. The witnesses were therefore excluded, and the defendants' counsel excepted to the decision. The jury, under the direction of the court, rendered a verdict for the plaintiffs for the amount of the note and interest, and judgment having been perfected thereon, the defendants appealed to the general term.

M. T. REYNOLDS, *for Plaintiffs.*

S. STEVENS, *for Defendants.*

By the Court, HARRIS, J.—This case presents directly for adjudication, the question whether, under the first clause of the 397th section of the Code, one joint contractor is a competent witness for his cocontractor, who is also his codefendant. The

Patons and Stewart agt. Westervelt.

the testimony of witnesses within this state." But under the first article it must appear either that the witness is about to depart from the state, or that he is so sick or infirm as to afford reasonable grounds for apprehension that he will not be able to attend the trial.

If the construction contended for by the plaintiffs be correct, then all the parties to the seven hundred causes at issue and ready for trial in this court may, upon affidavits simply that the testimony of the witnesses is material, be examined before a judge in advance of the trials, and he may be required to reduce all such testimony to writing.

And when this should be done the testimony could not be read upon the trials except upon proof of the death or insanity of the witness, or of his inability to attend such trial by reason of old age, sickness or settled infirmity.

I agree with the chancellor in the matter of Kips (1 *Paige*, 608), that "the officer must have some discretion and may require the party on whose application the examination is made, to explain the nature of the litigation so far as to enable him to judge whether such applicant is proceeding in good faith to *perpetuate* testimony against the adverse party, or is under that pretence only fishing for testimony to be used against the witness or for other purposes."

I must be satisfied in this case, before the examination can proceed, that the object is in good faith to *perpetuate* the testimony of these witnesses.

It certainly can not be for this object if it shall appear that the trial, which may be had at an early day, will necessarily determine the matters in difference between the parties, and that no subsequent or other suit between the parties, or between other parties, relating to the same subject matter, will be necessary.

Mechanics' and Farmers' Bank agt. Rider and Wilbur.

SUPREME COURT.

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question is one of considerable difficulty; but its difficulty consists not so much in any obscurity in the statute itself, as in the consequences which are supposed to result from a literal application of the language of the section. The common law rules relating to the competency or incompetency of witnesses are, to a great extent, arbitrary and technical. To say that a witness who has an interest in the event of a suit, to the amount of six cents, shall be excluded, while another whose whole fortune, though not involved in the particular issue upon trial, may depend upon the question to be decided by the trial is admitted, seems little less than an absurdity. To say that one who, as bail or security, may be contingently liable to a limited amount can not testify, even though he may feel himself perfectly secure in the responsibility of his principal, while a child, though in the confident expectation of inheriting the estate of his parent, and in fact regarding the estate as already his own, is allowed, without objection, to testify upon an issue involving the whole of that estate, would seem to any mind, not trained to regard with veneration every thing pertaining to the common law, as the extreme of absurdity: and yet these are among the prominent and acknowledged rules of evidence, at common law, sanctioned by the acquiescence of centuries. The innovation which the code proposes to make upon these venerable absurdities, seems to those who have been accustomed to deal with, and apply the common law rules of evidence, startling and dangerous. Hence the effort has been made by some, more alarmed at the radical change effected by these provisions of the code than others, to restrict and limit their application to particular classes of cases. Some think the particular section in question only applicable to cases of tort, in which, at common law, a recovery might be had against one defendant, while another was acquitted. Others think it is applicable only to cases founded upon equitable principles. Mr. Justice GRIDLEY, and his associates in the fifth district, seem to have adopted the latter opinion. Accordingly it was held in a case decided at the general term, in which that learned judge delivered the judgment of the court, that by the clause in question "the legislature merely

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intended to adopt the rule as it prevailed in chancery, and enact it as a part of the statute law, applicable to cases arising under the Code" (Munson vs Hagerman, 5 *Howard*, 223). I am not sure that I understand precisely to what extent the learned judge would give effect to this statute. The language of his proposition is certainly not very explicit; but the practical application of his rule was, in the particular case then before the court, to exclude a defendant, offered as a witness for his codefendant, in an action to recover damages for the conversion of personal property.

A similar question has been decided at a general term in the sixth judicial district. There the action was against several defendants, for an assault and dattery. At the circuit, one defendant was offered as a witness for his codefendants, and rejected. Upon appeal the decision at the circuit was reversed; and it was held that in such actions, at least, the defendants are competent witnesses for each other. A very elaborate opinion was written in the case by Mr. Justice SHANKLAND. He states the result of his examination as follows: "Upon the fullest consideration, I have no doubt that in actions commenced since the code, a plaintiff or defendant may, *in all cases*, call his fellow plaintiff or defendant to testify to all questions pertinent to the cause and that judgments may be entered, in accordance with the facts, in every diversity of form, as was formerly done by decrees in the late court of chancery (Parsons vs. Peirce, 3 *Code Rep.*, 177). A very able opinion was also delivered by Chief Justice MONSON, in the same case. That learned judge arrives at the same result. The opinion is yet in the hands of the reporter. The whole question, therefore, as to the effect to be given to this particular section of the code, may be considered as fairly open for discussion and adjudication.

In considering this question, it may be well to bear in mind that an essential change in the form of the judgment which may be rendered in any action, where there are two or more plaintiffs or defendants, has been made by the 274th section of the Code. Now, as has been well said by Mr. Justice SHANKLAND, "judg-

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ments may be entered in accordance with the facts, in every diversity of form." One plaintiff may recover; another may be defeated. Judgment may be rendered in favor of one defendant, and against another; and that too, whether the action is for a tort, or upon a contract. In an action upon a joint contract, like that now before the court, it may well happen that the plaintiffs may recover judgment against one of the defendants, and not against the other.

The sections of the code which immediately precede the 397th, from the 389th to the 396th, inclusive, relate to the examination of a party on behalf of the adverse party, and contain directions, in detail, in respect to such examinations. The 397th section then follows, and declares in language explicit and unqualified, that "a party may be examined on behalf of his coplaintiff or a codefendant." It is not, let it be observed that a party in an action for a tort, or an action founded upon principles of equity, or any other specified kind of action; but *any party in any action*, may be examined upon any pertinent matter, not only when called by the adverse party, as provided in "the preceding sections, but also when called by his coplaintiff or his codefendant. In short, *any party to any suit* may have the benefit of the testimony of *any other party to the same suit*. But when such a party is called to testify by his coplaintiff or his codefendant, the effect of his testimony must be restricted; otherwise, while in fact giving evidence for another, he might also be giving evidence in his own behalf. Hence the qualification which immediately follows the general proposition of the section: "The examination thus taken shall not be used on behalf of the party examined." Thus he is rendered, in legal effect, disinterested. His testimony can not, legally as it otherwise might, operate to maintain the issue to be tried on his behalf. It is true, that some discrimination on the part of the jury, and some caution on the part of the court, is requisite to restrict such testimony to its legitimate office. But there is no more difficulty in this, than in some other cases, now quite familiar in practice, as for example, the case of the maker and endorser of a note, sued under the statute, in the same action,

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and one defendant examined, as he may be, for his codefendant. In such a case, it is well known that it often happened, that one defendant succeeded upon the testimony of his codefendant, whilst judgment was recovered against the party testifying, for the want of the same evidence. It is intended by the provision of the code now under consideration, to extend the same principle to all other cases. Thus, in the case now before the court, it might happen that the testimony of one of the defendants, being available for his codefendant, might be sufficient to exonerate such codefendant from liability upon the contract, while the witness himself, his own testimony not being available on his own behalf, might, for the want of such testimony, remain liable. A judgment might thus be recovered in favor of one defendant, and against the other, upon the same contract.

Nor could it be objected, under such circumstances, that the witness should be excluded on the ground of interest. Suppose, in the case under consideration, the defendant Rider had been examined as a witness, and he had proved enough to entitle the other defendant to a verdict in his favor, could such a result affect his interest favorably? On the contrary, might not the effect of his testimony be to charge himself solely, when, without such testimony, the judgment might have been against both defendants, and he if compelled to pay the amount, entitled to contribution. A case might arise, I admit, where the objection on the ground of interest might prevail. Thus, where two defendants are sued as joint contractors, and yet, as between themselves, one of them is a principal and the other a surety, I will not now say that the principal would be a competent witness for his surety. The effect of his testimony might possibly be to relieve his surety, and thus shield himself from ultimate liability for his indemnity. I concede that under the 399th section of the Code, restricting the general application of the preceding section, such a witness, being a party to the action, might be excluded "by reason of his interest in the event of the action."

This, then, I understand to be the intent and import of the 397th section of the Code. Any party to any action may be

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examined as a witness on behalf of any other party; but when examined on behalf of a coplaintiff or codefendant, his testimony is not to have the same general effect as other testimony in the cause, but is to be applicable only to the issue between the party on whose behalf he is examined and the adverse party. Such a witness may be excluded on the ground of interest; but as his testimony can not affect the issue between him and the adverse party, this objection can only be sustained when the party offered as a witness is not only interested in succeeding himself, but also in having the party by whom he is offered, succeed also. In the ordinary action against joint contractors, like that before us, the witness has no such interest. On the contrary, if he has any interest at all, it is to increase the number of those who are to assist in the payment of the recovery.

It has been said that the effect of this rule is to allow several defendants by mutually becoming witnesses for each other, to exonerate each other from liability. There is much force in this consideration; but it goes only to the question of credibility. It can not affect the competency of the witness. The same reciprocal service might be rendered by witnesses who were parties to separate actions, in which case no objection on the ground of interest would be allowable. Where parties are called to testify for each other, under such circumstances, their testimony ought to be received with extreme caution. Indeed, a discreet jury, properly instructed in relation to their duty, would hardly feel themselves justified in deciding any question upon such evidence, unless sustained by other testimony, or corroborating circumstances; the testimony itself is competent. It belongs to the jury to say, as in other cases of a suspicious character, what weight is to be given to it.

In one case, indeed, and in but one, a party may be received as a witness for himself. A plaintiff or defendant having been examined as a witness at the instance of the adverse party, may have given evidence in his own favor, and at the same time prejudicial to his coplaintiff or codefendant, who is a joint contractor, or united in interest with him. In such a case, it is but just that

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the party to be affected by such testimony should be heard also. Accordingly it is provided in the last clause of the 397th section, that a party thus situated may offer himself as a witness to the same cause of action or defence, in respect to which his co-contractor or the party united in interest with him has testified, and that he shall be received. In this case, no objection on the ground of interest can be sustained.

This view of the provisions of the Code relating to the examination of parties as witnesses, gives effect to each provision, and renders all harmonious. It gives to the language employed by the legislature its natural and most obvious import. It avoids all forced construction and leaves nothing for interpretation. No two persons "of common understanding," and who were uninitiated in the common law rules of evidence, would differ in their construction of these sections. On the other hand, to hold that while all the other provisions of the Code relating to the examination of parties, apply to all actions, the first clause of the 397th section must be limited in its application to such actions as are founded upon principles of equity, or to any other particular class of actions, would be to adopt an unnatural and forced construction of the language of the statute; a construction uncalled for, and unwarranted by any other provision in the Code, and opposed to the great principle avowed in the preamble of that act, which is to abolish the distinction between legal and equitable remedies, and establish an uniform course of proceeding in all cases. My opinion, therefore is, that the learned judge who tried this cause at the circuit, erred in excluding the defendants when severally offered as witnesses for their codefendant. I think the testimony should have been received and submitted to the jury, with particular instructions as to its legal effect, and proper cautions as to the weight to be attached to it. Upon this ground alone, I am in favor of reversing the judgment, and awarding a new trial, with costs to abide the event.

Justice WATSON, concurred.

Justice PARKER read the following dissenting opinion:

PARKER, Justice.—This suit was brought to recover on a joint note, made by the defendants on the 12th June 1848, for \$7000 and interest. The note was given for borrowed money, and the defence set up was usury. On the trial, after the note was proved, each defendant offered the other defendant as a witness to prove the defence of usury. The judge excluded such evidence, and the defendants excepted. The question now presented is, therefore, whether, under the Code, in an action against two joint contractors one defendant may be examined as a witness for his co-defendant, to prove—not a defence personal or peculiar to his codefendant—but a defence to the entire joint contract. The question is important and demands the most deliberate consideration.

The evidence was offered under the first clause of section 397 of the Code, which is as follows: "A party may be examined on behalf of his coplaintiff or a codefendant." It is said this means "*every* party may be examined," &c., and I am willing to concede, for the purpose of discussing this question, that such is its meaning, and to give it an application accordingly. In a suit on a contract that is several as well as joint, each one of two defendants is of course competent, and may prove any defence in behalf of his codefendant, as fully as if separate suits had been brought. And in actions on a contract, joint and not several, I have no doubt each defendant is a competent witness in behalf of his codefendant, to prove any defence that is personal to his codefendant, such as a discharge in bankruptcy, infancy, &c. Actions for torts stand on the same footing as actions on contracts, which are several as well as joint; as to such actions, I have stated my opinion more fully in Selkirk agt. Waters (5 How. Pr. R. 296). In *every* action, therefore, a party may be examined on behalf of his coplaintiff or codefendant.

But it by no means follows that the party thus made competent in every action, may be permitted to prove whatever the coparty calling him chooses to ask him, as in every other case, the testimony must be confined to the issue on trial, and to matters relevant and pertinent.

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Now, there were no matters in issue between the plaintiff and either of the defendants separately. On the contrary, there was but one contract, and that was between the plaintiffs of the one part, and the two defendants jointly of the other part. The plaintiffs made one party to the contract and the two defendants, jointly, the other party. If either defendant had set up any defence, personal or peculiar to himself, he could of course, have been permitted to prove it by his codefendant; because that would have been a severance of the contract and would have authorized separate judgments. But such was not the case here. There was but one contract, and that was joint and indivisible; and the defence was as joint as the contract. It went to the entire demand; if it fell short of that it was incomplete and unavailable.

The presiding justice in his opinion, from which I dissent, assumes that in this case, and on such an issue, a judgment might have been rendered in favor of one defendant and against the other. If this was so, I admit that each defendant was a competent witness to prove the defence for the other; for, if this was so, the case stood upon the same footing as a joint and several contract. I concede that if, on such a defence, several judgments could have been rendered, the evidence offered should have been received. We all agree, I believe, that the whole case turns upon this point. If there could have been a several judgment, the evidence would have been relevant. If there could not, the evidence would have been entirely immaterial and inapplicable.

It is not claimed that, before the adoption of the code, separate judgments could be rendered upon a joint contract, except in a very few cases where one of the defendants had a personal defence that amounted to a severance of the contract; as where one of the defendants pleaded infancy or a discharge in bankruptcy. But it is supposed that by section 274 of the Code, the court is authorized to render several judgments in every case where there are two or more defendants. The section is as follows: "Judgment may be given, for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it

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may determine the ultimate rights of the parties on each side, as between themselves," &c.

If this were all on the subject, to be found in the code, I should by no means infer, that it was intended to authorize several judgments on a joint contract. On the contrary, I should suppose it was merely giving authority to conform the judgment to the contract, as it should be ascertained to be on the trial. This the court could not do under the former practice. There were certain technical rules of practice, that operated unjustly, and which it was designed to abrogate. For instance, if under the late practice a suit was brought against three persons as partners, and it turned out on the trial that but two of them were partners the plaintiff was nonsuited and driven to a second suit to recover his demand; but as the law now stands, under the Code, judgment would be recovered against the two proved to be partners, and a judgment would be given in favor of the other defendant. So in an action on a bond purporting to be signed by three defendants, if it is proved on the trial that the name of one is a forgery, judgment is given in favor of that defendant and against the others. But under the late practice, judgment would have been given in favor of all the defendants; and the rule is now the same as to plaintiffs. Three persons bring an action, it is proved on the trial that the demand in controversy is due to but two of them, and judgment is therefore rendered in their favor and against the other plaintiff. Under the late practice, all three of the plaintiffs would have been nonsuited. This change in the practice, so clearly promotive of the administration of justice, has been effected by the section of the code last cited. Its object plainly was to enable courts to enforce contracts, as they should be ascertained, at the trial, to have been made. Its object, as plainly, was not to authorize courts to violate contracts by rendering several judgments, when the parties had made such contracts joint and not several.

In one view, the statute is a highly beneficial one, effecting a much desired and valuable reform; enabling courts and juries to do justice between the parties, where before, they were precluded

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by technical but arbitrary and unyielding rules of practice from doing so. In the other view, it is a dangerous invasion of the rights of the citizen, severing and violating his contract, and refusing to enforce it in the form in which it was made. If the Code has difficulties to encounter on the one hand, from those who look upon its innovations with apprehension, it has quite as much to fear on the other, from a construction of its provisions that virtually gives to the court the power to alter the agreements of parties and to fashion them to suit its own pleasure.

If the construction claimed by the defendants for the 274th section is correct, then in all cases in a suit on a joint contract, judgment may be rendered in favor of one and against the other defendant. In other words, there are no longer any joint contracts; all contracts are to be treated as several. Surely this could never have been intended. If, therefore, there were no other provisions of the Code throwing light on this subject, it would seem to me absurd to say that it was intended to abolish all distinction between joint and several contracts.

But there is much in the Code bearing upon this point and we are bound to look at all its provisions, and so to construe them, if practicable, as to give them a harmonious operation.

That joint contracts are still recognized, and are to be enforced as such, is apparent from chap. 11 of title 12 of the Code, entitled of "Proceedings against joint debtors," &c., in which section 375 points out how a plaintiff may proceed when a judgment shall be recovered against one or more of several persons *jointly indebted upon a contract*, by permitting those not originally served with process to be summoned to show cause why they should not be bound by the judgment. That is applicable to a case in which, as under the former practice, the original judgment was in form against all the joint contractors.

Again, section 397 recognizes the character of joint contractors and their unity of interest, by providing that whenever "one of several plaintiffs or defendants, who are joint contractors, or are united in interest, is examined by the adverse party, the other of such plaintiffs or defendants may offer themselves as witnesses,

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&c." This privilege is confined to joint contractors, and the distinction between joint and several contracts is thus clearly recognized.

It is also provided in the second clause of section 274 as follows: "In an action against several defendants the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, *whenever a several judgment may be proper.*" It seems then there are some cases where a several judgment is not proper. What are they? Of course they are not cases on several contracts, nor for torts, which are several as well as joint, for in those cases several judgments were always proper. They can be no other than cases of joint contract.

But there is another and a controlling section of the Code, which seems to have been entirely overlooked by those who contend that a several judgment may be rendered on a joint contract.

"§ 136. Where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows:

1. If the action be against several persons jointly indebted upon a contract, he may proceed against the defendant served, in the same manner as at present, and with the like effect, unless the court shall otherwise direct; or,

2. In an action against defendants severally liable, he may proceed against the defendant or defendants served, in the same manner as if such defendant or defendants were the only parties proceeded against.

3. If all the defendants have been served, *judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants if the action had been against them or any of them alone.*"

These provisions show unequivocally that the contract as made by the parties is to be respected and enforced; and that it can not be severed by rendering a several judgment.

The suit now before us comes within the 3d subdivision. Both

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the defendants were served, and the contract being joint and not several also, the plaintiff would not have been entitled to judgment against either of the defendants if the action had been commenced against one of the defendants alone. He can not, therefore, take judgment against one when they are sued together. If sued alone the defendant would have found a remedy provided for him by demurrer, under § 144, sub. 4, on the ground that there was a defect of parties defendant. This last provision was evidently designed for such a case.

I think I need say no more in defence of the proposition that on the defence of usury in this case a judgment could not have been rendered in favor of one defendant and against the other.

Suppose then, one of the defendants had been called to prove the usury; his evidence could not be received in his own behalf (*Code*, § 397), and as to the other defendant alone there was no separate issue—nothing to try. In as much as no judgment could be given in favor of the other defendant alone, the evidence would not bear upon the case, and could have no legal effect. If one defendant had been permitted to testify and had proved the usury, and the trial had stopped there, what judgment could have been given? Not in favor of both defendants for the statute precludes the witness having any benefit of his own testimony. Not in favor of one defendant, for that can not be on a joint contract. The judgment would, after all, have been given for the plaintiff, and therefore, it will be perceived, the evidence of the witness would have been entirely immaterial and irrelevant.

A joint note given at one transaction, and signed by two-defendants, can not be usurious as to one and not usurious as to the other defendant.

If the mode of the defence attempted on the trial can succeed, two persons entering into a joint contract with one person, will have greatly the advantage in litigating concerning it. The two persons can be sworn, each for the other, but the other party to the contract and the action can not be permitted to testify.

The construction I have given to the section in question, har-

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monizes entirely with the other provisions of the act and gives effect and usefulness to a statutory reform in the law of evidence. I think I have shewn that the construction contended for by the defendants is objectionable in both these respects, and destructive to the rights of parties. After a very careful examination of the case I am entirely satisfied the decision at the circuit was correct, and that a new trial should be denied.

Justice WRIGHT did not hear the argument, and was not present at the decision.

5 How. 414—FOLLOWED, 6 How. 241. *Contra*, 5
467; 6 Id. 315, 316.

SUPREME COURT.

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The nature and office of an execution is not changed by the Code; as formerly, it can only issue to *enforce the judgment*. It can not be predicated upon an *order of arrest*, alone.

If the judgment does not show that the action is wholly in tort, a *ca. sa.* can not issue founded upon the order of arrest, previously issued under § 179, sub. 4 of the Code.

Jefferson Special Term, January 1851. This action was commenced in December 1849, to recover a balance due from the defendant, arising out of partnership transactions of the parties, and also to recover some items of private account. It is alleged in the complaint that a portion of the partnership indebtedness arose from the secret and fraudulent conversion of *some* of the company effects.

At the commencement of the suit the plaintiff procured an order to arrest the defendant under section 179, sub. 4 of the Code, upon affidavits setting forth that the defendant fraudulently contracted the debt, or incurred the obligation for which the suit was brought. The defendant was arrested, and without moving to vacate the order, gave bail and was discharged under section 186. The cause was tried before referees, who reported generally that the defendant was indebted to the plaintiff in a certain sum.

An execution against the property of the defendant was issued

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and returned unsatisfied, and thereupon a *ca. sa.* was issued, and the defendant arrested. This motion is now made to set aside the *ca. sa.*, as not warranted by the judgment.

MANN & EDMONDS, *for Defendant.*

CLARKE & COLVIN, *for Plaintiffs.*

HUBBARD, Justice.—The *ca. sa.* is sought to be sustained on two grounds. 1. That it is authorized by the judgment; and 2. That aside from the judgment it can be upheld by the order of arrest. The first point is manifestly untenable. The principle of the execution in this case is, that the debt was fraudulently contracted or incurred. There is no such distinct averment or issue presented in the complaint. It is true that some of the partnership effects, which form a portion of the plaintiff's claim, are alleged to have been fraudulently contracted; but it is to be observed that the action is not *trover* but *assumpsit*; and besides, this averment of fraud, has relation only to a part of the indebtedness sought to be recovered. The *judgment* does not, therefore, authorize the *ca. sa.*

The important question to consider on this motion is, whether a personal execution can be based upon an order of arrest, *dehors* the judgment in the action. Before the Code of Procedure the object and office of the execution was well understood; it issued to carry into effect the judgment (1 *Bur. Pr.* 288). It must strictly pursue the judgment and be warranted by it otherwise it might be set aside on motion. The Code, which now embraces the whole law as to the *form and cases* in which an execution may issue, has not changed the nature and office of this writ. This is obvious by reference to sections 283, 286 and 289. These sections speak of the *enforcement of judgments*, or the provision of the execution. The whole object of the process is to enforce the sentence of the court or the law in the action, as appears on the judgment.

The order of arrest, it seems to me, takes the place of the order to hold to bail under the former system. Its office is to seize the defendant and hold him in custody as auxiliary to an anticipated

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ca. sa. upon the judgment. That this is the intent of the Code, will appear from section 187, which prescribes the mode of release from imprisonment under the order. An undertaking is to be executed, conditioned that the defendant shall at all times render himself amenable to the process of the court during the pendency of the action, *and to such as may be issued to enforce the judgment therein.*

The vitality of the order is exhausted with the arrest and discharge, and the plaintiff must look to the undertaking for all further advantages resulting from the order. It seems to me, clearly, that the order can not thereafter, nor under any circumstances be made the ground work of a *capias ad satisfaciendum*. The legislature, I think, could not have intended so great a change in the office and theory of the process of execution. The Code, in my judgment, does not materially change the law as it previously existed on the subject of executions, except that it prescribes a *formula* for the writ: the different kinds and primary object remain as heretofore.

I have been referred to a decision of Justice JONES, in 2d Code Reporter, page 1, to the effect that an order of arrest may be made upon affidavit irrespective of the case made in the complaint. That decision does not contravene the views I have expressed; the question of ca. sa. was not involved in that case, and hence it is not an authority in point on this motion. But with deference to the opinion of the learned justice, I may be permitted to inquire as to the utility of retaining an order of arrest, obtained upon a case made aside from the complaint, when it is obvious, that as no ca. sa. can issue on the judgment, no advantage whatever can be realized, because there can be no breach of the undertaking.

In such a case, the only effect of the order, it seems to me, would be to oppress the defendant, *without benefit to the plaintiff*, except such as might possibly flow from *coercion*. which is not favored in legal proceedings.

It is not necessary that I should decide upon this motion, whether the complaint must set forth a case authorizing an arrest under section 179. I will remark, however, that it appears to

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me that it should, otherwise the *judgment* could not warrant a *ca. sa.*; and in no other way can it be seen, that under section 288, which alone authorizes a personal execution, that the "*action*" is one on which the defendant might have been arrested as provided in sections 179 and 181." It may be that in this view of the Code, issues might be formed of difficult trial, but that was a subject for the law-makers and not the courts to consider.

The motion must be granted, but without costs, as the questions presented are not settled under the Code.

SUPREME COURT.

Dexter, President of the Bank of Whitestown, agt. **Gardner** and others.

The free school law (*Session Laws* 1840, page 534, § 16), repeals section 132 of the 5th article, chapter 480 of the act of 1847, which contains the powers of the State Superintendent to hear and decide *appeals* in certain matters therein stated. This 5th article in the act of 1847 is, by the 7th section of that act made a *substitute* for the corresponding article in the Revised Statutes, containing the same powers as to appeals. (*Art. 5, tit. 2, ch. 15, part 1, § 124, 1st vol. page 487*). Consequently the repeal of the 132d section of article 5 in the act of 1847, divests the state superintendent of all power of hearing and deciding upon the appeals therein given.

Therefore, in any suit brought against town superintendents, or officers of school districts, under the act of 1847, and as prescribed by section 146 of that act (*Session Laws of 1847, page 714*), the plaintiff, on recovery, is entitled to costs. That section requiring that the subject matter of the action "*might have been the subject of appeal to the superintendent*"; and not allowing costs against such officers if the court certified that it appeared on the trial that they acted in good faith.

An extra allowance for costs under § 308 of the Code, denied, where the trial occupied but two or three hours, and nothing peculiar in the character of the cause, although the questions were somewhat complicated. (*The reasoning in the case of Howard agt. The Rome and Turin Plank Road Co. 4 How. Pr. R. 416, adhered to*).

Oneida Special Term, April 1851. This suit was tried at the late Oneida circuit, and resulted in a verdict for the plaintiff. It was brought against the defendants, who were trustees of a school district in Whitestown, to recover the amount of a school house tax of \$1069.09, imposed on the Bank of Whitestown, and collected

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of the bank. The application was made at this time, by consent, for a certificate that it appeared on the trial that the defendants had acted in good faith, and for a decision that they be relieved from the payment of costs under the 146th section of chap. 480 of the Laws of 1847. At the same time a cross motion was made for an allowance under section 308 of the Code.

W. TRACY, *for Defendants.*

T. R. FLANDREAU, *for Plaintiff.*

GRIDLEY, Justice.—In the view I have taken of this case, it will be unnecessary to consider the various questions of law and fact discussed on the argument, bearing on the questions of the good faith of the defendants. For, if I should grant the certificate, I am still of opinion that it would not avail the defendants.

The provisions under which this motion is made, is found in section 146 of chapter 480 (*Laws of 1847, p. 714*). It reads as follows: "In any suit, which shall hereafter be commenced against town superintendents, or officers of school districts, for any act performed by virtue of, or under color of their offices, or for any refusal or omission to perform any duty enjoined by law, *and which might have been the subject of an appeal to the superintendent*, no costs shall be allowed to the plaintiff in cases *where the court shall certify that it appeared on the trial of the cause, that the defendants acted in good faith.*" The difficulty in the way of the defendants, is, that the grounds on which the suit was brought, could not have been the subject of an appeal to the superintendent. The superintendent is an *administrative* and not a *judicial officer*, and can entertain no appeal by virtue of his *general powers*, but is confined exclusively to the express powers conferred by the act. This jurisdiction was conferred upon him by the last section of article 5th, title 2d of chap. 15 of the 1st part of the Revised Statutes (1 R. S. 487, § 124). In chap. 480 of the laws of 1847 (*p. 684, § 7*), it is provided "that the third, fourth, fifth and sixth articles of title 2, chapter 15, part 1st of the Revised Statutes, shall be, and the same are hereby amended so as to read as follows:" then follow the several articles entirely rewritten, and much, extended. The *fifth article*, in

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which the powers of hearing and deciding appeals is given to the state superintendent, is entirely reconstructed; is much enlarged; is separated into several distinct divisions, and is, under section seventh, before cited, made a *substitute* for the corresponding article before mentioned in the Revised Statutes. That article is so amended as to read as the fifth article does in the act of 1847. Of course some of the sections are transferred without alteration, from the Revised Statutes, to the article which was to take its place in the system of laws on the subject of common schools. Among the sections thus transferred is the one which gives the authority to the superintendent to hear and decide appeals. That provision is found, without alteration, in section 132 of the act of 1847. After the passage of the act for submitting the free school law to the people, and on the 11th of April 1849, the legislature amended chapter 480 of the laws of 1847, in various particulars, and repealed in express terms section 132, which alone gives the power of hearing appeals, to the superintendent (*see Laws of 1849, p. 534, § 16*). By the repeal of this section the superintendent was divested of all power to hear and decide appeals as completely as though it had never been conferred upon him. To this, it is said, that the repeal of section 132 of the act of 1847, revives the corresponding provision in the Revised Statutes. I think not; the fifth article in chapter 480 of laws of 1847, takes the place of the fifth article of title 2 of chapter 15 of the first part of the Revised Statutes. The article in the Revised Statutes was so amended as to read in the very language of the article in the laws of 1847. In fact that article became substituted by the amendment, in the place of the old article in the Revised Statutes. The repeal extinguishes, therefore, the jurisdiction of the superintendent, as effectually as if the original section conferring it had never been enacted, and had itself been repealed. Again it is said that the repeal of this section was done by mistake; we have no means of knowing that. The printed statute book is conclusive evidence upon all courts. A *casus omissus*, or an inadvertent omission on the part of the legislature, has never been held equivalent to an enactment of

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what had been unintentionally omitted (1 *Term Rep.* 52). The words being clear and certain, do not admit of any construction consistent with the continued right of appeal (6 *B. & C.* 475). The powers of appeal is utterly subverted. The superintendent is divested of his judicial character, and has no more jurisdiction to hear an appeal than the trustees themselves, or any other officer who is clothed with purely administrative powers. It is true, that an appeal is given by the 40th section of the act of 1841 (*Laws of 1841, p. 244*), in all cases arising under that act. But this question arises under the 62d section of the act of 1847. The powers of appeal in the present case, therefore, can not be aided by the provision referred to in the act of 1841. For this reason, therefore, without expressing any opinion on the other questions discussed on the argument of the motion, the application is denied.

The motion for an allowance is also denied. I can not assent to the construction given by Judge BARCULO to the 308th section of the Code, in 5 *Howard*, 121. I adhere to the interpretation given to the provision under consideration in the case of *Howard vs. The Rome and Turin Plank Road Co.* (4 *Howard*, 416). The trial occupied only two or three hours; and there was nothing peculiar in the character of the cause, though the questions were somewhat complicated (see also 4 *Howard*, 71, 185, 252, 441).

SUPREME COURT.

Houghton agt. SKINNER AND EMERSON.

An answer in the nature of a plea *puis darrien continuance*, will not be allowed after two trials, where the defendant had knowledge of the facts before answering in the cause.

Essex Special Term, March 1850. This was a motion for leave to plead a former judgment against a codefendant. The suit was on a joint and several promissory note, and the attorney for plaintiff and defendants stipulated that the plaintiff might take and perfect judgment in the action against Emerson alone for the amount of the debt claimed in the complaint and costs; leaving the liability of the defendant Skinner, in this action to be deter-

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nined on the trial thereof. After this stipulation the plaintiff entered up judgment against Emerson, and issued a *fi. fa.*, which was returned *nulla bona*. After judgment against E., Skinner put in an amended answer. The cause was tried between the plaintiff and Skinner, and the last time, at the last February Franklin circuit, where the plaintiff had a verdict. Skinner now moves for leave to amend his answer by pleading the judgment against Emerson in bar. The defendant S. it was said was a surety for E.

B. POND, *for the Motion*.

A. B. PARMELEE, *Contra*.

HAND, Justice.—The defendant contends that bringing a suit against both makers of the note, is an election to treat it as joint, and therefore a judgment against one defendant is a bar. Also, that there can be but one judgment in a suit, particularly upon a joint contract (*Pierce v. Kearney*, 5 *Hill*, 82; *Moss v. McCulloch*, *id.*, 131). On the other hand, not only is the effect of this judgment denied, but it is insisted that the answer proposed to be put in, is in the nature of a plea *puis darrien continuance*, and that such a plea is never allowed after verdict (*Palmer v. Hutchins*, 1 *Cow.*, 42). The Code, it is true, gives great latitude of discretion as to amendments (§ 173, 177). But there must be some limit; and the old rules are safe guides and should be followed in this exercise of discretion, unless some very special reasons render their application unjust. No doubt this plea can not be put in as a matter of right after verdict (2 *Tidd's Pr.* 775; 1 *Paine & Duer's Pr.* 508; 1 *Burr. Pr.* 423). Nor can this case be brought under § 177 of the Code, for the defendant knew of this judgment against E. before he put in his last answer.

In *Palmer v. Hutchins*, the party was relieved on motion, where he had had no opportunity to plead his discharge. But here, the defence which the defendant now wishes to interpose, was well known to the defendant before issue joined, and there have been two trials since. If it be a defence, which it is unnecessary now to decide, still I think we should adhere to the old rule in such cases. Motion denied, with \$7 costs.

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SUPREME COURT.

VAN HEUSEN & CHARLES agt. KIRKPATRICK.

On bringing an appeal from a justice's court, to the county judge, the payment of the fee of the justice for making the return to the appeal, must be made at the time of the service of the notice of appeal. It is ground for dismissing the appeal, where the return is not made in consequence of the non-payment of such fee.

Albany Special Term, Feb. 1851. Motion to dismiss an appeal.
On the 8th of April 1850, the plaintiffs recovered, in the Albany Justices' Court, a judgment against the defendant for \$67.40. On the 27th of April, the defendant made his affidavit and served upon the justices and the plaintiffs copies thereof, with a notice of appeal. The fee prescribed by the 371st section of the Code, was not paid to the justice, at the time the notice of appeal was served. Within the time allowed by law, a counter affidavit was made and served on behalf of the plaintiffs. The justices decline making a return for the reason that the fee required by law to be paid, was not paid when the notice of appeal was served. It also appears that on the 27th of May, one of the attorneys for the appellant tendered to the justices the fee for making a return, which they refused to receive. On the 26th of December 1850, the county judge made a certificate that he was interested in the action, pursuant to the 31st section of the amended judiciary act (*Sess. Laws. 1847, p 643*). Before making such certificate, the county judge had made one or two orders, referring the matter for hearing and decision to a referee, but no decision had been had thereon. The plaintiffs move to dismiss the appeal, upon the ground that the fee for making a return to the appeal was not paid to the justices as required by law.

E. J. SHERMAN, *for Plaintiffs.*

W. BARNES, *for Defendant.*

HARRIS, Justice.—A justice is allowed a fee of one dollar for making his return to an appeal. If this fee is not paid on the service of the notice of appeal, the justice is not bound to make

a return, nor is it in the power of the appellate court to compel such return. The appeal can not be brought to a hearing until the return is made. What, then is to be done in such a case? How is the party against whom an appeal is taken, to put the appellant in motion? It can not be, that such an effect is to be given to the provisions of the Code as to allow a party to perfect his appeal by the service of the proper papers, and then by omitting to pay the requisite fee, to prevent a return being made, and thus obtain a perpetual stay of proceedings; and yet this would be the necessary result of the construction contended for by the appellant's counsel.

It is true, that the due service of the notice of appeal is sufficient to give the appellate court jurisdiction of the case. But it does not follow from this, that the appeal is thereby perfected, or that it can not be dismissed after such notice. On the contrary, the very section of the Code, upon which the appellant's counsel relies, provides that when "*any other act necessary to perfect the appeal*" shall have been omitted through mistake, the court may still allow it to be done. Upon an appeal from a justice's court, the payment of the fee requisite to obtain a return, is undoubtedly such an act. The return is necessary to perfect the appeal; until it is made no review can be had—no final determination of the action can be made. If in this case, as there is some reason to believe, the payment of the fee was intentionally omitted at the time of the service of the notice of appeal, then it would not be a case for relief, even upon terms, under the provisions of the 327th section of the Code. But if the payment was omitted through mistake, then he ought still to be permitted to perfect his appeal, if, by any means, he can obtain a return. The justices are under no obligation to make such return, nor has the court the power to require it. But if they can be induced, voluntarily, to make it, the appellant may yet perfect his appeal.

The appellant's counsel seems to have supposed that because the provisions of the former statute relative to appeals (2 R. S. 259, § 191,) which declared that no appeal should be valid, or have any effect, unless, among other things, the justice's fee

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should be paid within a prescribed time, are omitted in the Code, the payment of such fee could not be regarded as necessary to perfect the appeal; but this view is clearly erroneous. Under the former statute, the fee must be paid within thirty days, or the appeal became ineffectual. This peremptory requirement is omitted in the Code, and yet the payment of the fee is equally necessary as before. Now the appeal may be made effectual, if the return can be procured, although the fee was not paid at the time prescribed by the Code. Under the former statute, there was in fact no appeal, unless within the time prescribed for that purpose the fee was paid. This I understand to be the only difference between the two statutes. The appeal must be dismissed with costs, unless within ten days the appellant shall procure and file in the proper office a return, and pay the costs of this motion.

SUPREME COURT.

WENDELL agt. MITCHELL AND OTHERS.

An answer can not be amended in matters of substance, where it sets up title, and is the same put in before a justice of the peace to remove a cause.

Warren Special Term, August 1850.

A. MEEKER, moved to amend an answer. The suit was commenced before a justice of the peace; a plea of title interposed, &c., and on a suit being brought in this court, the same answer *in totidem verbis* was put in, and the cause referred; and before report, this motion was made upon sufficient ground if the suit had originated here. He cited the Code, sections 122, 173, 177, and insisted that the court might amend all pleadings for the furtherance of justice.

J. W. CULVER; contra, cited 12 *Wendell*, 207; 11 *id.* 642; 15 *id.* 237; 2 *id.* 647; 4 *Denio*, 175; 3 *How. Pr. R.* 391.

HAND, Justice—denied the motion. He thought a party could put his pleadings below in proper form here; or, however inartificially drawn, this court could treat them as in proper form, but could not amend so as to affect them in matters of substance.

Motion denied.

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SUPREME COURT.

KNEISS agt. SELIGMAN.

The purchase money for goods, merchandise, &c., can be recovered, where the seller knew they were intended to be used by the purchaser for an illegal and unlawful purpose, in violation of a statute (against the excise law, &c.) where the sale is made in the ordinary course of trade, and the illegal design does not enter into and form a part of the contract, and where there is no act done by the seller in aid of such unlawful design beyond the bare sale.

In other words, the bare knowledge of the seller, that the purchaser intends to use the property unlawfully, is not sufficient to vitiate the contract of sale and render it illegal and void.

*Wayne Circuit, April, 1850.*JOHN T. MACKENZIE, *for Plaintiff.*WM. VAN METER, *for Defendant.*

SELDEN, Justice.—The complaint in this action alleges that the defendant is indebted to the plaintiff for goods, wares, merchandises, groceries and lumber, sold and delivered generally, without any specification of the property sold. The plaintiff, however, has furnished a bill of particulars, containing a large number of charges for beer sold and delivered.

The answer sets up that the beer, for which the plaintiff seeks to recover, was sold by the plaintiff to the defendant with full knowledge that the latter intended to sell the same at retail without license, and in violation of the excise laws, and relies upon this as a defence to that part of the action.

To this answer the plaintiff has demurred specifying the causes of demurrer.

It is well settled that the only effect of a bill of particulars is to limit the testimony on the trial to the items contained in the bill and that a party can not plead or answer to such a bill.

The answer must be to the previous pleading and not to the bill of particulars which forms no part of the record (*Starkweather vs. Kittle*, 17 *Wend.* 20; *Anon.* 19 *Wend.* 226 and note; *Dibble vs. Kempshall*, 2 *Hill*, 124).

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The Code has not changed the law in this respect; but this objection to the answer can not be noticed here, for the reason that it is not specified as one of the causes of demurrer. By section 153 of the Code, a plaintiff in demurring to an answer is required to state the grounds of the demurrer; and although not expressly said, it is necessarily to be inferred that he is to be confined to the objections thus specifically taken.

It becomes necessary therefore, to examine the main question presented, which is, whether one who sells goods to another with knowledge that the vendee intends to convert them to an unlawful use, as in this case, spirituous liquors to be sold at retail without license, can maintain an action for the purchase money.

Now it is abundantly settled and there is no necessity for citing authorities to prove that a contract for the commission or performance, or which contemplates the commission, or performance of any crime or wrongful act, or act prohibited by law, is void and can not be enforced. But the principle contended for here goes much farther.

It is not claimed that the contract made by the plaintiff was in itself unlawful, or that it provided in any way for the doing of any wrongful act. The sale by the plaintiff was, so far as appears in the ordinary course of business, and in itself considered such as he had a perfect right to make; and it was no part of the contract of sale that the property should be used for any unlawful purpose, nor did the fact that such use of it was contemplated constitute any portion of the inducement which led the plaintiff to sell. But he knew that the purchaser did entertain the design at the time of the purchase, of reselling the property in violation of the excise laws. Did this knowledge by the plaintiff of the vendee's intention vitiate the contract of sale and render it illegal and void?

Before proceeding to the examination of the authorities upon this question, I may remark that the defendant is here setting up his own turpitude in bar of the plaintiff's claim. He does not deny that he has had the property and used it for his own benefit, but says that at the time he purchased he intended to use the

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goods in an unlawful manner, which the plaintiff knew, and therefore he is not bound to pay.

This, however, is no objection to the defence, if the case falls within the settled rule in obedience to which courts have universally refused to lend their aid to enable one party to an unlawful contract to enforce it against another, as between the parties to such a contract, no matter to what extent one has obtained the advantage, the law will afford no aid to the other; and this rule rests upon the soundest principles of public policy. The question here is whether this is such a case.

It is not alleged that the design of appropriating this property to an unlawful use was actually carried out, but only that the defendant intended so to appropriate it; an intention which, for aught that appears, he may have abandoned the day after the purchase.

Now it can hardly fail to strike any one, that the rule here insisted upon would afford some facilities for roguery. A party after having obtained possession of property to a large amount under an avowed intent to make some use of it which the law prohibits, may avail himself of *locus penitentia*, converting the property to a lawful use, and then protect himself by this defence against liability for the purchase money; and this ultimate design may have been secretly harbored from the beginning without the possibility of proof.

It will also occur to any one whose attention is turned to this subject, that while the intention to commit a crime, or to do an unlawful act, when nothing is done to carry that intention into effect, is not a crime, nor in any way punishable, yet the rule contended for here would impose a severe penalty or forfeiture upon one who did not even participate in the unlawful design, but simply knew of it; and that too for the benefit of the only party who entertained the wrongful intent.

In this view the proposition would seem to be repugnant to our common sense; and yet there are authorities which perhaps may be considered as countenancing the doctrine. It will be necessary, therefore, to examine the authorities bearing upon the question somewhat critically.

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One of the earliest cases in which this question, or one analogous to it arose, is that of *Falkney vs. Reynous*, (4 *Burr.* 2069). There the plaintiff and one of the defendants had been jointly concerned in certain stockjobbing transactions which were illegal and prohibited by act of parliament.

The plaintiff had advanced \$3000 in compromising and closing up these transactions, for one half of which the defendants had given their bond, upon which the action was brought. These facts were pleaded by the defendants and upon the demurrer the court held it no defence. Lord Mansfield, in speaking of the giving of the bond by the defendant says, "This is not prohibited. He is not concerned *in the use which the other makes of the money*; he may apply it as he thinks proper. But certainly this is a fair, honest transaction *between these two*."

The next case, I think, it necessary to notice is that of *Holman vs. Johnson* (1 *Cowp.*, 341). The plaintiff Holman, a resident of Dunkirk, had sold to the order of the defendant a quantity of tea, *knowing* that it was intended to be smuggled by him into England; but the plaintiff himself had no concern in the smuggling, but merely sold the tea in the ordinary course of business. The action was brought for the price of the tea, and the above facts appearing, the question was whether the plaintiff could recover. It was held that he could. Lord Mansfield delivers the opinion in this case also. He says, speaking of the sale of the tea, "The contract is complete and nothing is left to be done. The seller indeed *knows* what the buyer is going to do with the goods, *but has no concern in the transaction itself*. It is not a bargain to be paid in case the vendor should succeed in landing the goods, but the interest of the vendor is totally at an end, and his contract complete by the delivery of the goods at Dunkirk."

These two cases fully bear out the position taken by the plaintiff here; that where the contract is honest and lawful as between the parties themselves, and does not, *per se*, provide for any thing contrary to law, it will not be vitiated because one of the parties contemplates by some further use of the property to violate some law, and that is known to the other party. The last case especially, is undistinguishable in principle from the present.

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But there are some later cases which are supposed to have established a somewhat different rule. The case of *Biggs vs. Lawrence* (3 D. & E. 454), *Clagor vs. Penaluna* (4 D. & E. 466), and *Waynell vs. Reed* (5 D. & E. 599), were all cases in which the plaintiff had sold goods abroad, knowing that they were to be smuggled into England; and so far were like the case of *Holman vs. Johnson*, above cited; but they differed from that case in this—that in each of these three cases the plaintiff had done some act in addition to the sale, which went in aid and furtherance of the defendant's design to violate the revenue laws, such as packing the goods in a peculiar manner to facilitate their being smuggled; and for this reason alone it was held in these cases that the plaintiff could not recover.

In the last case, *Waymell vs. Reed*, Buller, J. states the distinction in the clearest terms. He says, "In *Holman vs. Johnson*, the seller did not assist the buyer in the smuggling; he merely sold the goods in the common and ordinary course of trade. But this case *does not rest* merely on the circumstance of *the plaintiff's knowledge* of the use intended to be made of the goods, for he actually assisted the defendant in the act of smuggling by packing the goods up in a manner most convenient for that purpose." These cases, therefore, instead of impairing the authority of the case of *Holman vs. Johnson*, go to fortify and sustain it.

The case of *Lightfoot and al. vs. Tenant*, in the English common pleas (*Bos. & Pul.* 551), is one of the earliest cases in which any thing has been said having a tendency to establish the position taken by the defendant here, but if closely examined that case will not be found to support the doctrine. That was a motion for judgment non obstante verdicto. The opinion of Ch. J. Eyre was not given there with his accustomed clearness and precision. He does, indeed, seem to argue that bare knowledge by the vendor that the vendee intended to make a prohibited use of the goods would defeat a recovery for the price, yet he subsequently puts the decision most distinctly upon the ground that the jury had found that the wrongful use to be made of the goods, entered into and formed part of the original contract of sale. He

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says, "But the jury having found for the plea, the court can not say that the plaintiff had nothing to do with the future destination of the goods, unless it was impossible to state a case in which they could have any thing to do with it. I think it was not disputed that if the plaintiff's contract extended to the future destination of the goods, such a contract would be void. It seems, therefore, hardly necessary to enter into an examination of the four cases which were cited from Cowper and the Term Reports." The four cases here alluded to were *Holman v. Johnson*, and the three cases above cited from D. & E., and this extract, therefore, conclusively proves that the decision was put upon grounds entirely distinct from those cases, and was not intended to impair their force or authority. It may be difficult to reconcile all that was said by the learned chief justice in this case with the principle adopted in *Holman v. Johnson*, but there is nothing in the *point decided* here which is inconsistent with that case.

It may be well before leaving this case of *Lightfoot v. Tenant* to note that the plea which had been found by the jury for the defendant, averred that the illegal design in regard to the destination of the goods had been actually carried out by the vendee.

The next case having a direct bearing upon the question, is, that of *Langton and others v. Hughes and al.* in the Court of Kings Bench in England (1 *Maule & Sel.* 593), and as this is one of the strongest cases in favor of the doctrine contended for by the defendant, it will be necessary to give it a careful examination. The case was this: a statute of 42 Geo. 3, prohibiting brewers from using any thing but malt and hops in the brewing of beer; a subsequent statute (51 *George*, 3), prohibited druggists from selling to brewers certain articles used by them in contravention of the previous statute. The plaintiffs, who were druggists, after the first of these statutes, but before the last, had sold to the defendants, who were brewers, certain drugs, knowing that they were to be used by the defendants in their business, contrary to the provision of the prior statute, and this action was brought to recover the price of the articles so sold. It was conceded that the statute of 51 Geo. 3, having been passed after the


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sale, did not affect the case, and yet the court held that the plaintiff could not recover.

Now it would indeed seem that the court in deciding this case must have adopted the principle contended for here by the defendant. But the case has some peculiar features and does not appear to me to have been very well considered.

In the first place, although the decision appears to come directly in conflict with the principle of *Holman v. Johnson*, a leading case, yet that case is not referred to either by the counsel or the court. Two of the judges, Ellenborough and Le Blanc refer, not to the cases themselves, but to the principles of the cases of *Biggs v. Lawrence*, and the other cases in *D. & E.*, cited above, as sustaining their decision without adverting to the distinction taken in those very cases, between one who aids and assists the vendee in carrying out his illegal design and one who barely knows of the existence of such design but does nothing in furtherance of it; and Bayley, Justice, cites *Lightfoot v. Tenant* as an authority for the doctrine of this case; while, as I have before shown that case decided nothing inconsistent with the case of *Holman v. Johnson*.

Again, a close examination of the opinion given in the case under consideration will show, I think, a little hesitation in the minds of the Judges, whether to rest their decision upon the statutes or upon the principles of the common law. Lord Ellenborough, in speaking of the act of 42 Geo. 3, says, "There is a distinct prohibition in the act against *causing* or *procuring* to be mixed any ingredient except malt and hops, and a person who sells drugs with a knowledge that they are meant to be mixed, may be said to cause or procure *quantum in illo* the drugs to be mixed." And Le Blanc, Justice, after stating the question, says, "That depends upon the provisions of 42 Geo. 3 *coupling them* in their construction with those of 51 Geo. 3." So while one of those judges was endeavoring to make out that the act of the plaintiff was a direct violation of the first statute, the other seemed to think that the latter act, although passed after the sale, could in some way be brought to bear upon the case.



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Upon the whole, I think it will be apparent to any one who reads this case attentively in connection with the previous cases on the subject, that the decision here was really produced by the statute of 51 Geo. 3. Had the sale been made after that act was passed, the plaintiff could not have recovered; and the case was so clearly within the mischief intended to be prevented that the act was suffered, perhaps unconsciously, to control the decision. At all events I can not consider this case as overruling that of *Holman v. Johnson*, confirmed as the latter had been by the subsequent case to which I have referred.

We come, then, to two later cases in the English courts which are supposed to sustain the defence here. The first of these is the case of *Carman v. Bryce* (3 *Barn. & Ald.* 179). There the defendant had lent money to a firm which afterwards became bankrupt for the purpose of paying a balance due upon certain illegal stockjobbing transactions, and which had been applied to that object. The defendant having afterwards received money belonging to the bankrupts, the assignees brought their action to recover those moneys, and it was held that the defendant had no right to apply them in payment of his demand for the money loaned. The other case is that of *McKinnell v. Robinson* (3 *Mees. & Wels.* 434). That was an action of assumpsit for money lent, &c. The defendant pleaded that the money was lent in a certain common gambling room, *for the purpose* of the defendant's illegally playing and gaming therewith, and on demurrer the plea was held to be good.

Now, at first view, these cases might appear to go the length contended for by the defendant here. But it will be observed that they are distinguishable from the case before us, as well as from the case of *Holman v. Johnson*, in this at least. that in both the cases under review the illegal use was the express purpose for which the money was lent, and this circumstance is noticed and relied upon by the court in giving its opinion in both cases.

In the case of *Carman v. Bryce*, Abbott. Ch. J. says: "It will be recollected that I am speaking of a case wherein the means were furnished with a full knowledge of the object to which they

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were to be applied, *and for the express purpose of accomplishing that object,*" and in the case of McKinnell vs. Robinson, Lord Abinger lays down the doctrine thus: "This principle is that the repayment of money lent, *for the express purpose of accomplishing an illegal object,* can not be enforced." This language used in both these cases "for the express purpose" is equivalent to saying that the motive and object of the lender in loaning the money was that it should be applied to the unlawful use. He being thus a participator in the unlawful act, would not of course be permitted upon the principle of any of the cases to recover. These cases, therefore, do not seem to me to go far enough to sustain the defence set up here.

The defendant's counsel has cited two cases from our own courts upon which he relies.

The first is that of Ruckman vs. Bryan (3 Denio, 340). The marginal note of that case is as follows: "Money knowingly lent to be staked on the event of a horse race, can not be recovered back;" but on looking into the facts we find that the plaintiff himself made the bet of \$3000, in which he allowed the defendant to take an interest of \$600 and loaned the latter the money for his share.

The case clearly does not bear out the note, although the latter may be correct if the words "to be staked" are understood to mean that the motive and object of the lender in making the loan was that it should be so staked. But upon the case itself, it should seem that there could be no doubt. The plaintiff was himself not only a participator but the principal in the illegal transaction; he loaned the money to be used in carrying out, not a contract to which he was not a party, like many of the cases, but his own personal contract. No recovery could be had in such a case without overruling all the authorities upon the subject.

The other case is that of Morgan vs. Goff (5 Denio, 364). The money here was not loaned to be used by the defendant upon his own account, but was sent to the defendant to be by him used in betting upon the election *for the plaintiff*. As in the last case, therefore, the plaintiff was himself the principal in the illegal

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design. The contract between him and the defendant was, that the latter should take the money and appropriate it for the benefit of the plaintiff to a purpose prohibited by law. The express contract therefore between the parties, was clearly tainted with turpitude, and had the suit been brought to enforce that contract the case would have been too clear for argument. The action, however was founded upon an implied undertaking to return money which the defendant had actually received belonging to the plaintiff. But the court held in substance that the law would not raise by implication a contract to refund the money under the circumstances. This case, although in some respects peculiar and new, has no direct bearing upon the question involved here. I see nothing, therefore, in either of the cases decided in our own courts which can aid us in coming to a correct conclusion in this. It was said upon the argument that the Supreme Court of Vermont had lately passed upon the question, and held as contended for by the defendant here. As I have not been able to lay my hand upon that authority I can say nothing in regard to it. There may have been something in that case to distinguish it from the one before us.

My conclusion from this review of the cases is, that there is no case which has been brought to my notice with the exception of that of *Langton vs. Hughes*, which goes the length necessary to sustain this defence; and that case comes in direct conflict, not only with the case of *Holman v. Johnson*, but with the spirit of many other cases, and ought not to be followed.

The doctrine established by the authorities to which I have referred, and others upon the subject, I hold to be this: That where a party who sells goods or advances money to another with knowledge of a design on the part of the latter to put the goods or money to an unlawful use, does any act whatever beyond the bare sale, &c. in aid or furtherance of the unlawful object, he can not recover; or if the illegal use to be made of the goods or money enters into the contract, and forms the motive or inducement in the mind of the vendor or lender to the sale or loan, then he can not recover. The latter proposition may, however,

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require to be qualified by the addition provided the goods or money are actually used to carry out the contemplated design, as no case has arisen in which this distinction has been insisted upon, although it was, perhaps, involved and virtually decided in the case of McKinnell vs. Robinson (3 *Mees. and Wels.* 434,) before cited.

But I think it is not established, and will never become the settled law, that bare knowledge on the part of a vendor that the vendee intends to put the goods to an illegal use, which intention may or may not be followed up, will vitiate the sale and deprive the party of all remedy for the purchase money. Such a doctrine would be repugnant to all the reasoning upon which the principles of our criminal code in regard to the punishment of principals and accessories in crime are founded, reasoning which is equally applicable to penalties of the kind insisted upon here. It would be to punish a party as accessory to a wrong when no wrong may have been committed.

The doctrine relied upon by the defendant does not reach this case, because here the illegal design does not enter into or form any part of the plaintiff's contract, nor has he done any thing to aid in its accomplishment.

Judgment for the plaintiff upon the demurrer, with leave to the defendant to amend within twenty days upon payment of costs.

SUPREME COURT.

COLLINS agt. THE ALBANY AND SCHENECTADY RAIL ROAD COMPANY.

An appeal will not lie in the first instance to the general term upon a case containing questions of *fact alone*. Applications for a new trial must first be made at the special term. (See *Leggett agt. Mott*, 4 *How. Pr. R.* 325; *Lusk agt. Lusk*, *id.* 418; *Graham agt. Milliman*, *id.* 435.)

Albany General Term, May 1851. HARRIS, WATSON and PARKER, *Justices*. This was an action brought to recover damages for an injury sustained by the plaintiff while a passenger in the defendant's cars. It was tried before Mr. Justice PARKER, at the Albany circuit in March 1850. The jury rendered a verdict in

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favor of the plaintiff for \$11,000; from the judgment rendered upon this verdict the defendants appeal. The facts in the case sufficiently appear in the opinion of the court.

J. A. SPENCER, *for Plaintiff.*

M. T. REYNOLDS, *for Defendants.*

By the Court, HARRIS, Justice.—This appeal is founded upon the alleged error of the jury in deciding a question of fact properly submitted to them. No error of law is complained of, either in the decisions upon the trial or in the charge to the jury. Indeed, there is not a single exception in the case. The defendants ask for a new trial solely upon the ground that the verdict is against evidence. Can an appeal be maintained in such a case? I think not. The Code provides that an appeal "*upon the law*" may be taken to the general term, but there is no provision authorizing an appeal where the decision is against evidence, or where the damages are excessive. What should be the mode of relief in such cases is, it must be admitted, not very clear. In fact the Code contains no express directions on the subject. The practice in this respect is left, almost entirely, to implication. But the question has recently received the deliberate attention of several judges, and especially of Mr. Justice GRIDLEY, who, in a well considered opinion, has come to the conclusion that an application for a new trial on the ground that the verdict is against evidence, can only be made at a special term (*Lusk vs. Lusk*, 4 *Howard*, 418. See also *Leggett vs. Mott*, 4 *Howard*, 325; *Graham vs. Milliman*, *id.* 435; *Hastings vs. McKinley*, 3 *Code Rep.* 10; *Crist vs. New York Dry Dock Co.* *id.* 118). I think it may now be considered as settled that where a party seeks to be relieved from an *error of fact*, as distinguished from an *error of law*, he must, in the first instance, apply at a special term. It was intended to make the general term, strictly an appellate tribunal, and, upon questions of fact there has been no decision, which can be the subject of review, until the motion for a new trial has been made at a special term and decided. The decision upon such a motion, whether a new trial is granted or denied, is the proper subject of an appeal under the 349th section of the

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Code (see cases above cited). Without considering the case upon the merits, therefore, I think the appeal should be dismissed. But as this branch of the practice has, until very recently, been wholly unsettled, the dismissal should be without costs, and without prejudice to the right of the defendants to apply for a new trial at a special term.

SUPREME COURT.

POMEROY AND LEONARD agt. HINDMARSH AND WHITE.

A mere refusal to pay a debt, whether the debtor be solvent or not, is not cause for issuing an injunction under § 219 of the Code.

Nor is it sufficient that the defendant threatens to make an assignment for the benefit of his creditors.

To obtain an injunction, facts should be shown. Suspicion, belief and information are not sufficient.

Clinton Special Term, Feb. 1850. G. M. BECKWITH moved to dissolve an injunction granted by a local officer, residing in the county of St. Lawrence, restraining the defendants "from making an assignment, transfer, or other disposition of goods, effects, choses in action, or other evidences of debt to them belonging, for any purpose, until the final perfection of judgment in this action or until the further order of this court; and in case of disobedience to this order the said defendants, H. & W., will be liable to the punishment therefor prescribed by law." The affidavit of the plaintiffs' attorney, upon which the injunction was granted, did not state whether a suit had been commenced; but stated the amount due to plaintiffs on two promissory notes and that he believed the defendants were "about to make an assignment of their property and effects to some person to this deponent unknown, for the purpose, among others, of impairing the rights of the said Pomeroy and Leonard, and thereby rendering the judgment ineffectual for the collection of the demand against the said Hindmarsh and White; and this deponent further says that he forms this belief in the premises upon the declarations of the said White made to him, this deponent, on the 17th day of January A. D. 1850, which declarations of the said White were that

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they, the said H. & W., would make an assignment of their property and effects, and that they were not able to pay their debts, and further that the said H. & W. refused to give this deponent as agent and attorney of the said P. & L. any security for the payment of this said debt, and deponent further says that he verily believes the said H. & W. have sufficient goods and chattels, choses in action and evidences of debt, to pay each and every of their creditors if they were disposed so to do."

L. D. BROCK, *Contra*.

HAND, Justice.—By the last clause of section 219 of the Code, "where during the pendency of the action it shall appear by affidavit that the defendant threatens, or is about to remove or dispose of his property with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition." This injunction must have been granted under this provision. The affidavit, however, states that the attorney believes that the assignment will render the judgment ineffectual. But to bring it within that part of the section, the act, I think, must be done during the litigation, and in violation of the plaintiffs' rights respecting the subject of the action (*Hovey v. McCrea*, 4 *How. Pr. R.* 31). No facts tending to show this, are stated, nor could well be in a suit on a note. The affidavit is wholly insufficient on this last clause. It does not show that any action was pending; nor does it show that the defendants threatened to remove or dispose of their property with intent to defraud their creditors; nor that they were about to do so. It discloses no fact except that one of the defendants stated to the plaintiffs' attorney that they were unable to pay their debts and would assign their property; and they would not secure the claim of the plaintiffs in preference to others. It further adds, that the defendants have enough to pay their debts if they were disposed to do so.

The commencement of a suit (if one had been commenced) gave the plaintiffs no lien upon the property of the defendants, much less were the defendants guilty of fraud within the meaning of this statute, because they would not pay the plaintiffs on demand before the suit, and in preference to every other creditor. Such a construction would make a debtor guilty of fraud, if he

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did not pay a debt on demand, to the exclusion of all others. So far from this being a conclusion of law, a debtor in failing circumstances, is permitted to prefer one *bona fide* creditor over another. Again, a statute which suspends all powers of a party over all his property, *pendente lite*, and operates as an attachment, should be strictly complied with. Facts and circumstances should be shown so that the court can see that a fraud has been threatened or is about to be perpetrated. This must be made to "appear" to the court, and by the proper proof, and not by mere suspicion or belief. Injunctions are not issued upon mere information and belief. Such was the old rule (and see *Roome vs. Webb*, 3 *How. Pr. R.* 328).

The motion must be granted with costs.

SUPREME COURT.

THE STOCKBRIDGE IRON COMPANY agt. MELLEN AND OTHERS.

A complaint containing six counts, or causes of action (similar to a declaration under the former practice, against a common carrier), held, to be a pleading inconsistent with the requirements of the Code (§142). All but one count stricken out as redundant.

Albany Special Term, March 1851. Motion to set aside complaint, or to strike out redundant matter. The action is brought to recover the value of a quantity of iron delivered by the plaintiffs to the defendants to be carried from Hudson to Cold Spring. The complaint contains six different *counts*, or causes of action, stated, substantially, according to the forms of counts in a declaration at common law, in an action against common carriers. The defendants move either to set aside the complaint altogether, or to strike out all but one of the counts.

E. P. COWLES, *for Defendants.*

K. MILLER, *for Plaintiffs.*

HARRIS, Justice.—The complaint in this action is in form and effect a declaration at common law: one, too, of the most objectionable description. To sustain such a pleading, would be to hold that any party is at liberty to choose between common law pleadings, and the pleadings prescribed by the Code. If a plead-

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ing like this, is sanctioned by the Code, then, indeed, it is a *misnomer* to call that act, "an act to simplify and abridge pleadings. The complaint is in no respect conformable to the requirements of the *second* subdivision of the 142d section of the Code. Unless, therefore, the plaintiffs shall, within twenty days amend their complaint so as to make it conform to those requirements, all the causes of action, or counts, stated therein, except the first, are to be stricken out as redundant, or irrelevant. The defendants are also entitled to the costs of this motion.

SUPREME COURT.

DAVIS, HOLMES AND DAVIS JR. agt. SCHERMERHORN.

One of several plaintiffs having been discharged under the two-third act, and assigned his property to a coplaintiff, after suit commenced, issue joined, cause referred and some testimony taken, plaintiffs were allowed to amend by striking out the name of the plaintiff discharged, and to show in the complaint the assignment to the coplaintiff.

Albany Special Term, August 1850. It was shown in this case, by affidavit, that since this suit was commenced, Holmes, one of the plaintiffs, had been discharged under the two-third act as an insolvent debtor, and under the order of the judge, assigned all his property to another plaintiff, Charles M. Davis, assignee, duly appointed for that purpose; and that the property assigned was not sufficient to pay his debts. On these facts the plaintiffs moved to strike out the name of Holmes as a plaintiff, and to amend the declaration so as to show the assignment to Davis. It appeared issue had been joined and the cause referred to a referee, before whom some testimony had been taken.

C. STEVENS, *for Plaintiffs.*

J. K. PORTER, *for Defendant.*

PARKER, Justice.—Ordered that such amendment be made, and the name of Holmes be struck out, on paying \$10 costs of this motion, and on giving security, by a bond to be approved by the county judge of Rensselaer county, to pay, in case the defendant recover judgment in this action, that portion of the defendant's costs which had accrued previous to the time of making this motion,

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SUPREME COURT.

PORTER agt. WILLIAMS AND CLARK.

Where proceedings supplementary to execution are instituted under the Code, the order for the debtor's examination under the 292d section gives the judgment creditor the same lien upon the debtor's equitable assets which he acquired under the former practice by the commencement of a suit by creditor's bill. And the orders authorized by the 297th and 298th sections, themselves, and without an assignment by the debtor, divest his title in the personal property and vest it in the receiver.

W., on the 5th of January, assigned to C. all his property for the benefit of creditors, with power to sell *either for cash or credit*. This assignment is void (2 *Comst.* 365). On the 28th of March an order was made in proceedings supplementary to execution against W. and on the 4th of April, P. was appointed a receiver of W.'s property. On the 30th of March, W. executed a further instrument to C. declaring that it was intended that C. should sell *for cash* only.

Held, that P., the plaintiff had acquired a lien on the 28th of March, which rendered ineffectual the instrument of the 30th of March, even if otherwise of any effect.

Held, also that W. could not at any time after the execution of the assignment to C. revoke the authority therein contained to sell upon credit, and that the instrument subsequently executed was of no avail to render the assignment valid.

Demurrer. The action was brought by the plaintiff, as receiver to set aside an assignment executed by the defendant Williams to the defendant Clark. The assignment was made on the 5th of January 1850. It embraces all the property and effects of the assignor, except such articles as are by law exempt from levy and sale. It is made for the benefit of creditors, giving preferences. The assignee is authorized, by the terms of the assignment, to "sell and dispose of the property assigned, either at public or private sale, to such person or persons, at such price or prices, and on such terms and conditions, *and either for cash or credit*, as in his judgment may appear best, and most for the interest of the parties concerned; and to convert the same into money, and to collect the debts, &c." On the 27th of February 1850, the Dutchess County Iron Company recovered a judgment against Williams, for \$508.32, upon a debt contracted before the

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assignment. Upon which judgment an execution was issued on the 28th of February, to the sheriff of the proper county, and returned unsatisfied. On the 28th of March 1850, an order was made by one of the justices of the Supreme Court, pursuant to the provisions of the Code relating to proceedings supplementary to execution, requiring the judgment debtor to appear and answer before a referee, appointed for that purpose, on the 30th of the same month. On the 4th of April following, the same judge made an order appointing the plaintiff a receiver of the property of the judgment debtor, and also, by order, forbade a transfer or other disposition of the property of the judgment debtor, not exempt from execution, or any interference therewith. On the 30th of March 1850, Williams executed and delivered to Clark an instrument, whereby, after reciting that doubts had arisen whether by the assignment of the 5th of January, the assignee had the power to sell the property assigned *on credit*, and that it was intended to have it sold *for cash* only, the assignee was authorized and directed to sell the property for cash only. No assignment was ever executed by the judgment debtor to the receiver. It is admitted that immediately upon the execution of the assignment the assignee took possession of the assigned property; that he had in fact sold only for cash, and that he had applied a part of the moneys received by him as assignee to the payment of the preferred debts. On the 11th of April 1850, another execution was issued upon the judgment to the sheriff of Columbia, and Samuel Bryan, who owed the judgment debtor \$191.50, at the time of the assignment, paid the debt to the sheriff to apply upon the execution. The assignee claims that he is entitled to receive this debt under the assignment. The clause was heard upon the pleadings. Some of the facts above stated do not appear in the pleading, but were admitted by counsel upon the argument.

E. P. COWLES, *for Plaintiff.*

M. PECHTEL, *for Defendants.*

HARRIS, Justice.—A preliminary objection has been made to the right of the plaintiff to maintain this action. It is insisted

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that, even though the assignment from Williams to Clark should be declared void, the plaintiff has acquired no right to the property, because no assignment has been made to him by the judgment debtor. But I do not understand that an assignment to the receiver is necessary to pass the title of the judgment debtor. Under the former practice the filing of a creditor's bill, and the service of process, created a lien upon equitable assets, but not upon property liable to execution. The commencement of a suit to reach equitable assets had the same effect in creating a lien, as a levy upon personal property by virtue of an execution. Notwithstanding such bill, another creditor might issue execution, and take the property of the debtor subject to levy. This might be done until an order had been made for the appointment of a receiver. From that time, the property was deemed to be in the custody of the court, and could not be taken in execution. When under such an order a receiver had been appointed, and had perfected his appointment, by giving the requisite security, he became, by virtue of his office, legally entitled to the possession of the debtors property. It is true, that it was usual to require the judgment debtor to execute an assignment, but it was never held that such an assignment was necessary to divest his title. It never was supposed that, because the judgment debtor had absconded, or was otherwise beyond the reach of process, so that an assignment could not be enforced, the creditor was without remedy. On the contrary, the receiver acquired his right to take the property from the order for his appointment, and not from the assignment (2 *Barb. Ch. Pr.* 168-9). An order for the appointment of a receiver is an equitable sequestration (*Albany City Bank vs. Schermerhorn*, 9 *Paige*, 377). Neither the order for his appointment, nor even an assignment to the receiver pursuant to such order, would divest the debtor's title to his real estate (*Chautauque County Bank vs. White*, 6 *Barb.* 589). The receiver became entitled to the rents and income, but the title could only be divested by sale upon execution.

The Code is silent as to the time when the judgment creditor shall be deemed to have acquired a lien upon his debtors equitable

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effects; but I think the order for his examination, made under the 292d section, should be construed to give the creditor the same lien which he acquired under the former practice, by the commencement of a suit by creditor's bill. So, too, the order that the debtor's property should be applied towards the satisfaction of the creditor's judgment, made pursuant to the 297th section, and the order appointing a receiver pursuant to the 298th section, have the effect of themselves, and without an assignment by the debtor, to divest his title, and to vest it in the receiver. The order under the 297th section places the property under the control of the court, and the order under the next section creates an officer to take charge of it (see *Monell's Pr.* 364). If this be so, it follows that the attempt by the judgment debtor to give validity to the assignment of the 5th of January by the instrument executed on the 30th of March, was ineffectual, as the debtor could do nothing to divest the lien which his creditor had acquired by obtaining an order for his examination on the 28th of March.

But as there is another suit pending between the same parties, which differs from this only in the fact that the order for the examination of the debtor was made after the 30th of March, it may be well to consider here the effect of the instrument executed on that day, upon such a case. This question is only important upon the supposition that the assignment of the 5th of January contains provisions that would render it void as against creditors. Assuming that this is so, is there any thing in the instrument of the 30th of March which can give validity to that assignment? I think not. Had the assignment reserved to the judgment debtor a specific benefit, as the payment of a sum of money out of the proceeds of the assigned estate, I will not say that a release of such benefit, before proceedings should be instituted to avoid the assignment, might save it from being declared void. But even in such a case, the question would not be free from difficulty. Here the assignment prescribes certain terms and conditions by which the assignee is to be governed in the execution of his trust. Among these is one which, it is alleged, renders the assignment

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void as against creditors. The validity of the assignment, as against assignor, can not be questioned. Finding the assignment is likely to be questioned, the assignor subsequently executes another instrument by which he assumes to vary the terms of the assignment. Had he the power to do so? Could he revoke the authority to sell on credit, any more than he could the authority to sell at all? I think not. He had divested himself of all power to control the disposition of the property assigned when he executed and delivered the assignment. Whether that assignment is valid or not, as against creditors, must depend upon its own provisions, and not upon any thing done subsequently by the assignor, or even by the assignee.

The remaining question in the case has been judicially determined against the defendants in *Griffin vs. Barney* (2 *Comst.* 365). In that case, an insolvent debtor had conveyed all his property to trustees for the benefit of certain creditors. The trustees were authorized to sell the property assigned "at public or private sale, for cash or upon credit," &c. This was held to be an unanswerable objection to the assignment. A trustee has no right to sell property assigned to him for the benefit of creditors upon credit, and if the debtor undertakes to confer upon him this power, the conveyance is void. The debtor may give a preference among his creditors, but he can only do it by an *unconditional* devotion of his property to the immediate payment of his debts. If the assignment contain any other terms or conditions, or if it confers any other power or authority upon the trustee, it is void.

The plaintiff is therefore entitled to a judgment declaring the assignment void as against him, with directions for taking an account substantially the same as in *Wakeman vs. Grover* (4 *Paige*, 43). The judgment may also provide for the payment of the plaintiff's costs out of the funds in the hands of the assignee.

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SUPREME COURT.

THE PEOPLE ex rel. WILLIAMS agt. HULBURT, County Judge of Cayuga County.

In proceedings supplementary to execution under §292, of the Code, a county judge has no authority or jurisdiction to issue an order, for the defendant to answer, &c. until after an execution has been issued *against his property*. And this fact, and all others upon which jurisdiction rests, must be shown affirmatively; they are not to be deduced by inference or presumption.

Where the creditor claims the application of a demand or debt due to the debtor from a third person, and such demand or debt is denied, the judge can not proceed and try such disputed question of fact; he is only authorized to issue an order forbidding the transfer or other disposition of the claim, until a sufficient opportunity is given to the receiver to commence an action (§ 299).

A receiver may be appointed in such case, without any reference to the return of the execution.

The judge has no authority to order an assignment from the debtor to the receiver. Nor is an assignment necessary, as the title and authority for such purposes to rights and property of this description vests in the receiver immediately upon his appointment. (*See Porter agt. Williams and Clark ante page 441.*) In relation to real estate, an assignment is necessary to transfer the title to the receiver. And it seems that the *Supreme Court* has power, without any statutory provision, to order such an assignment.

A demand of the kind mentioned in this case, can not be levied upon and sold under an execution against the debtor.

A judge has no power to adjourn these proceedings from time to time, without the consent of the party against whom the proceeding is had.

Seventh Judicial District, General Term, June 1851. Present, WELLES, TAYLOR and JOHNSON, Justices. The facts will sufficiently appear in the opinion of the court.

WARREN T. WORDEN, *for Relator.*

J. PORTER, *for Respondent.*

By the Court, JOHNSON, Justice.—This was a proceeding supplementary to the execution upon a judgment in favor of Friend Humphrey and Robert Thompson, against the relator, before the county judge of Cayuga county, under § 292 of the Code.

The affidavit upon which the judge issued his order set out, among other things, that Alonzo G. Beardsley, as attorney for the plaintiffs, on the 27th of May 1850, issued to the sheriff of

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Cayuga county *an execution upon the said judgment*, which was delivered to the sheriff on the 28th day of said month of May. It further stated that the defendant in the judgment was then a resident of said county, and that the sheriff called upon him and exhibited the execution, and that the "defendant informed the said sheriff in substance that he had nothing upon which he could levy the execution."

It is objected on the part of the relator that enough does not appear upon the face of the affidavits to give the county judge jurisdiction to issue the order.

No authority is given to the party to apply for this order, or to the judge to issue it until after an execution has been issued *against the property* of the defendant.

Three kinds of executions are provided for by the Code. One against the property of the debtor, another against his person, and a third for the delivery of the possession of real or personal property.

The affidavits presented to the judge do not show what kind of an execution was issued upon this judgment.

If we were at liberty to indulge in presumptions in such a case, it might perhaps be inferred from what took place between the sheriff and the defendant in the execution, when the latter was called upon, and the execution exhibited, that it was an execution against his property.

But this will not do where the jurisdiction of an inferior officer to act in the first instance is drawn in question.

In all such cases the facts upon which jurisdiction rests must be shown affirmatively, and are not to be deduced by inference or presumption.

Nothing is to be presumed in favor of the jurisdiction of inferior officers and tribunals. This is too well settled, in this state at least, to require illustration or the citation of authorities in its support.

The affidavits here do not even disclose the nature of the claim on which the judgment was founded. But if they did we would not even presume that the party issued the proper execution.

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The fact is to be established by a direct and affirmative allegation in order to give jurisdiction to the inferior officer.

I think it is clear, therefore, that the county judge in this instance acquired no jurisdiction to issue the order and proceed to the examination upon these affidavits.

The claim which the judgment creditors sought to have applied in satisfaction of their judgment, was one which they alleged existed in favor of the relator against two firms in Auburn, for services rendered by him in their employ, and which they claimed Mrs. Watson, a daughter of the relator, had become liable to pay.

They sought to charge Mrs. Watson with the demand, and not the firms, and to obtain satisfaction from her. Both she and the relator denied the existence of any such demand or liability against her. The judge proceeded nevertheless to try this disputed question of fact and examined the relator, Mrs. Watson and other witnesses, and various documents and papers, as to the nature and origin of the claim and its alleged payment; and thereupon, as appears from his order or decree "adjudged and decided" that Mrs. Watson was the debtor of the relator, and that the amount of such indebtedness remaining unpaid should be applied in satisfaction of the judgment. All this part of the proceeding was wholly unauthorized and void.

The judge had no right whatever to try this disputed claim in this way, or to make any determination of any kind in regard to it. By § 299 of the Code, if the person alleged to be indebted to the judgment debtor denies the debt, the judge is authorized by an order to forbid a transfer or other disposition of it till a sufficient opportunity be given to the receiver to commence the action and prosecute the same to judgment and execution. This section expressly provides that such interest or debt shall be recovered *only* in an action by the receiver.

If the application of property which the judge is authorized to order by § 297 was intended to extend to debts due the judgment debtor, it must be construed to mean only debts or demands about which there is no dispute, as § 299 prescribes the only mode in which disputed claims are to be collected.

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It is contended on the part of the relator that the judge has no authority to appoint a receiver in any case until after the return of an execution. That by § 298 the judge is to appoint "in the same manner" as if the appointment was made by the court according to § 244, and by § 244 the court could only appoint receivers according to the then existing practice, which required an execution to be returned in cases of this kind before a creditor's bill could be filed.

This is a proceeding under the last clause of § 292, where the judgment debtor after execution *issued* against his property, refuses to apply property which he has in satisfaction of the judgment. In such a case I think the design was to authorize the appointment of a receiver without any reference to the return of the execution. This, I think, will be rendered apparent by reference to sections 297, 298 and 299. The appointment "in the same manner," only relates to the mode or form of the appointment, the case or circumstances which authorize it are found in § 292.

The judge also ordered the relator to make an assignment to the receiver appointed by him, and it is objected that the Code gives no authority, neither to the court nor to a judge to order an assignment.

The Code, it will be seen, makes no provision for an assignment, and consequently the judge had no authority to order it. An assignment, however, in a proceeding of this kind is probably wholly unnecessary in order to vest the necessary title in the receiver to enable him to prosecute demands and collect moneys due. I apprehend that the necessary title and authority for such purposes to rights and property of this description, vest in the receiver immediately upon his appointment, as an incident to the office without any formal assignment (*Rule 81; Chancery Rules 192; Edwards on Receivers, 83, 354*). In regard to real estate it is different. There an assignment under seal would be necessary to transfer the title to the realty to the receiver. Though perhaps he might collect rents and profits without any assignment.

Doubtless the Supreme Court, by virtue of its original and in-

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herent power and authority, and especially since the accession of equity powers and jurisdiction, may order and compel an assignment without any statutory provisions. Inferior officers and tribunals must, however, show a warrant in the statute for every step they take affecting the rights of parties before them, or the proceeding will be unauthorized and void. This difficulty is in no wise removed or avoided by the liberal rule of interpretation provided for by § 467.

The relator's counsel insists that as by § 463 personal property is made to mean and include demands of this description, and by § 298 whenever an execution is issued against the property of the debtor, it is made the duty of the sheriff first to satisfy the judgment out of the personal property, the demand in question should have been levied upon and sold; and that this proceeding is wholly unnecessary.

I apprehend that § 291 still restricts the operation of executions and the levy and sale under them to their former well understood and clearly defined limits notwithstanding the apparent confusion created by the absurd attempt to define and explain every thing "in such a manner as to enable a person of common understanding to know what is intended."

It is also contended that as the code makes no provision as to the time or manner of serving these orders, the court can not say whether any, and if any, what particular mode of service is the proper one, and consequently can not hold any service to be good. The service of the order in this case was personal, and we think that must be regarded as a good service.

Another objection is that the judge adjourned the proceedings before him from time to time, and that the code gives no right or authority to adjourn. Had the judge acquired jurisdiction in this case in the first instance, I think no advantage could have been taken here of the power exercised in adjourning, as all the adjournments appear to have been by the consent and agreement of the parties. Where no consent is given by the party against whom the proceeding is had, the judge in such cases has no more power to adjourn the proceedings than a justice of the peace would

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have to adjourn a cause before him without the authority of the statute.

The details of the code in that portion relating to proceedings of this character, are exceedingly loose and imperfect, and it is to be feared that great if not insurmountable difficulties will be experienced on that account in attempting to make the important and salutary general provisions available before county judges and justices at Chambers.

Lord Coke in his day complained of "acts of parliament overladen with provisoes and additions and many times on a sudden penned or corrected by men of none or very little judgment in law." And he adds: "If acts of parliament were after the old fashion penned, and by such only as perfectly knew what the common law was before the making of any act of parliament concerning that matter, as also how far former statutes had provided remedy for former mischiefs and defects discovered by experience; there should very few questions in law arise, and the learned should not so often and so much perplex their heads to make atonement and peace between insensible and disagreeing words, sentences and provisoes as they now do."

I think these reflections of Lord Coke may be very properly commended to the legislators of the present day.

All the orders and proceedings of the county judge were unauthorized and void, and must be set aside.

SUPREME COURT.

DOLE agt. FELLOWS.

An application for discovery or inspection of books, papers, &c. must be made upon *petition*.

At Chambers, Buffalo, May 1851. Mr JOHN GANSON, defendant's counsel, applies for an order, directing the plaintiff to permit the defendant to inspect and take copies of certain entries on his books, or that the plaintiff furnish the defendant copies of

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them. The cause is at issue and the discovery is desired to enable the defendant to prepare his defence and for trial.

The application is made upon an affidavit and not upon petition.

SILL, Justice.—In the *Exchange Bank vs. Monteath* (4 *How. Pr. R.* 282), Judge Harris is reported to have said, "I suppose that, under the code, if a proper case for a discovery should be made by affidavit, the court or judge should make the order." In that case the application was founded upon a petition. There was, therefore, no occasion for the remark quoted, and the point not being there involved, was not of course decided. I am not aware that this question of practice has been passed upon since the Code was amended in 1849.

In *Follet vs. Weed* (3 *How. Pr. R.* 303), I had occasion to hold, that an application for a discovery of books to enable a party to prepare for trial, was properly made upon petition. The decision was made after the code was adopted and before its amendment, and while the rules of 1847 were in force. I also came to the conclusion in that case, that the mode of proceeding to obtain a discovery, was the same then that it was before the Code took effect (see also the same case before Justice Hoyt, same book, 363). The slight amendment of section 388 of the Code in 1849, has not rendered the decision cited inapplicable to the present practice. That part of section 388 of the Code, as amended, which relates to discovery is not in substance different from the 21st section of the Revised Statutes on the same subject (2 *R. S.* 199). The Code is silent as to the mode of proceeding, to obtain the order for the discovery; but the Revised Statutes required the application to be by petition (§ 23, 2d vol. 199), and in the Code I have discovered nothing inconsistent with this provision of the laws of 1830. Section 471 of the Code, retains and makes applicable to the practice under it, existing statutory provisions, relating to actions, not inconsistent with this act, and in substance applicable to the actions hereby provided." Not only, therefore, does section 23 of the laws of 1830, by the common rules of construction remain unrepealed, but it is ex-

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pressly retained by the provisions of the Code which has been quoted. It may also be added that the practice before the code, required the application to be made upon a petition, and may be regarded as continued by section 469.

The 22d section of the statute of 1830, before cited, imposed upon the court the duty of prescribing by general rules, *the cases in which discovery might be compelled*, and it would seem that the case must be one embraced in these general rules, in order to justify an order for discovery. Accordingly the late Supreme Court provided by rule, that applications might be made, 1. By a plaintiff to compel a defendant to discover papers and documents necessary to enable him to declare or answer any pleading of the defendant. 2. By the defendant, to compel the plaintiff to discover papers and documents necessary to enable him to answer any pleading of the plaintiff. 3. By either party, after pleading, to compel a discovery of any papers or documents on which the action or defence was founded; and 4. By either party after issue, for a discovery of *books*, papers or documents, necessary to enable the party applying to prepare for the trial of the cause. The contents of the petition and form of the affidavit of verification, were also prescribed (*Rules 28, 29 of 1845*).

The same rules were adopted, without alteration, by the Supreme Court in 1847 (*Rules 27 and 28*). In the revision of 1849, the third and fourth subdivisions of rule 27 (now rule 8), were, for some cause not apparent, omitted; so that rule 8, as it now stands, embraces in express terms, only those cases in which discovery is necessary to enable the parties to frame their pleadings. What may be the effect of this omission, assuming that section 22, of the Revised Statutes, is applicable to the present practice, I do not now propose to inquire. But I refer to the rules to show that when they contemplate a discovery, they imply that it must be upon petition.

Rule 8, which prescribes the cases in which discovery may be sought, says that the application may be made "in the manner *provided by law*." Rule 9. provides what shall be stated in the petition, and the form of the affidavit, by which it is verified.

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Neither of these expressly directs as to the mode of the application, but that the court understood it to be prescribed *by law*, and that it must be by petition is too plainly indicated by their language to leave any room for doubt on the subject.

The 8th rule, it is true, does not expressly include cases in which the discovery is sought in order to prepare for trial, but the form of the affidavit prescribed by the 9th rule for verifying the petition, does embrace this class. While this shows that the rules were hastily and perhaps inconsiderately framed and adopted, it at the same time shows that the court did not contemplate the absurd practice of requiring a petition when the discovery was sought for one purpose and dispensing with it, when sought for another.

I do not feel called upon to show that the proceeding by petition, has any advantage over one by affidavit.

If the statutes or rules indicate a particular course of practice, it is my duty to preserve it, although I may not perceive its utility. These, in my opinion, plainly prescribe the practice to be followed in cases like this, and the motion is for this reason denied without prejudice to a new application upon petition.

5 How. 454—*Contra*, 9 How. 217.

SUPREME COURT.

WARNER agt. THE HUDSON RIVER RAIL ROAD COMPANY.

The Hudson River Rail Road Company, under their charter, and to the extent therein specified, are directly liable for all sums due to "laborers" upon their work, in all cases of non payment by the contractors.

And the term "laborers" includes not only those who personally perform labor, but all who do so by their servants and agents; also all superintendents over others engaged in actual labor upon the road.

Columbia Circuit, January 1851. The plaintiff claimed to recover \$89.25, for 29 $\frac{1}{4}$ days labor, performed by the plaintiff with his team, on section 85 of the defendants' rail road, between the first day of August and the twelfth day of September 1850. The work was alleged to have been performed under one of the de-

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fendants' contractors, and that on the 20th of September the notice required by the 5th section of the act amending the defendants' charter (*Sess. Laws* 1850 p. 14) was duly served.

The plaintiff also alleged that the defendants had, in like manner, become indebted to Henry A. Best in the sum of \$55.50 for eighteen and a half days labor performed upon the defendants' road, under a contractor, between the 15th of August and the 12th of September 1850. This debt had been assigned by Best to the plaintiff. The work was alleged to have been performed by Best with his servant, horses and team. The requisite notice was given on the 19th of September.

The plaintiff also alleged that the defendants were indebted to one William H. Warner in the sum of \$40.35, for thirty days labor performed by him between the first of August and the 12th of September, of which due notice had been given. This demand had also been assigned to the plaintiff. It was admitted upon the trial that William H. Warner had been employed by the contractor as an overseer. The facts above stated were also admitted, except that by consent of counsel, the amount of the several claims is to be adjusted after the decision of the legal questions presented in the case.

THEODORE MILLER, *for Plaintiff.*

C. L. MONEILL, *for Defendants.*

HARRIS, Justice.—I regard the statute under which this action is brought, as highly remedial in its character. The legislature, aware of the condition and habits of that class of persons usually engaged in the construction of public works, have sought to protect them against the fraud or insolvency of their immediate employers. The purpose was benign, and the act should be liberally construed.

The important terms used in the act are, "*contractors*" and "*laborers*." By the first, I think, we are to understand all such persons as assume to perform a specified portion of the work; and that, too, whether such persons have contracted with the defendants; or with other persons who have contracted with the

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defendants. In other words, I think the word "contractors," as used in the act, is to be understood to embrace all who employ "laborers" in the construction of the work, whether they be original or sub-contractors. So too, I think, the word "*laborers*," in contradistinction to the word "contractors" is intended to include such persons as, upon the employment of contractors, actually engage in the construction of the work. This, then, was the purpose of the legislature. It was intended that the defendants should see to it, that, at least to the extent specified in the act, those who actually performed their work, and not the contractors, upon whose employment it had been performed, should be paid for it. The language of the section containing this provision, though not very perspicuous, is sufficiently indicative of this intention. The defendants are, to the extent specified, to be liable for the payment of all sums due to "laborers" "in all cases of non payment by the contractors." Whenever any *contractor* employing *laborers* upon the defendants' work is indebted to such laborers, the latter, by pursuing the course prescribed, may, to the extent specified, make the defendants liable for their debt.

The application of the statute, thus construed, to the case in hand, would sustain the plaintiff's right to recover upon all the claims stated in the complaint. Whether the laborer (by which term, as we have seen, is to be understood the man who performs the work upon the employment of another who has engaged that it should be performed), whether he performs the work with his own hands, or with the hands of another man; whether he uses his spade and wheelbarrow, or his horses and wagon; whether he perform the work in person, or by his servant, he is equally a laborer within the intent and spirit of the statute, and entitled to its benefit. And so too, in whatever capacity he is employed. He who is employed to superintend others who are engaged in the actual labor of constructing the road, is as much a laborer, within the meaning of the statute, as those whom he superintends.

The counsel for the defendants relies upon the case of *Wood vs. Donaldson* (17 *Wend.* 550), and the same case in error (22 *Wend.* 395), to sustain the position that the defendants are not

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liable for debts due to laborers employed by sub-contractors. But to me the analogy between that case and the one under consideration, seems very slight. That was a case arising under the New York *lien law*. The remedy which that law provided was a remedy between debtor and creditor merely. It made the debts of certain creditors' privileged debts, and provided for their payment out of a fund belonging to the debtor. The very principle upon which that law was founded excluded sub-contractors from its operation. The principle was, that the moneys due from the owner of the building to the person with whom he had contracted should be paid to certain creditors of such persons, upon their application in the manner prescribed. It was not intended that the owner should, in any case, incur any new liability, or, in any event, pay more than he owed. The sole object of the law was to enable the creditor of the party to whom the owner of the building was indebted, to obtain payment out of that debt in certain cases. But here a liability is created by the statute, without reference to any indebtedness of the defendants to any one. It is enough that labor has been performed upon their road, and that the laborer has not been paid. The legislature, no doubt, supposed that when such a liability was imposed for the benefit of the "*operatives*" upon their road, the defendants would, as well they might, provide for their own indemnity in the contracts they should make for the construction of their work. But whether indemnified or not, they are alike liable, and that liability extends to all debts for labor actually performed in the construction of their road, to the extent limited in the act, when such debts are due from any person who has contracted for the performance of the work, and upon whose employment the labor has been performed. Judgment must be rendered for the plaintiff for the amount to which he is entitled upon this construction of the statute. Three other actions against the same defendants were tried at the same time, each involving one or more of the same questions. Each of these cases are disposed of by this decision

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SUPREME COURT.

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It is no ground for the readjustment of costs, that the clerk before whom they are adjusted refuses to allow 50 cents for entering the judgment. This fee belongs to him and he has a right to refuse it.

An affidavit for allowance of travel fees of a witness is defective where it does not state the distance *travelled* by him as such (5 *Hill*, 595; 2 *R. S.* 653, § 7). The statement merely of his residence, and the distance from where the trial is had, and his attendance, is insufficient.

Where costs are adjusted upon opposition, and the amount inserted in the judgment, which is afterwards paid, it is too late to move for a readjustment of the costs.

A party in interest can not be a witness, consequently can not be allowed fees for travel and attendance as a witness.

Schenectady Special Term July 1851. On the 25th day of April 1851, the costs in this cause were adjusted upon notice, and opposition, by the clerk of the county of Schenectady at \$34.82. The bill presented by the attorneys for the plaintiff amounted to \$49.70 $\frac{1}{4}$; of the items claimed on the part of the plaintiff, the clerk disallowed 50 cents for entering judgment; \$1.50 out of \$3, for the attendance of witnesses two days each, and \$12.88 charged for travelling fees for Jacob M. Schermerhorn from the place of his residence in the county of Cortland, to the city of Schenectady. After the costs were adjusted and the plaintiff's attorneys knew what items had been disallowed, they insisted that the judgment should be entered and docketed, although the defendant was present and offered to pay the damages recovered in the cause and the costs as they were adjusted; but after the judgment was entered, and on the same day, the defendant obtained specie and went to the office of the plaintiff's attorneys and paid the judgment, and the attorneys gave him a receipt for \$366.77, therein stating that that sum "being the amount of the recovery in this cause, viz, \$331.95 damages, and costs adjusted by the clerk, at \$34.82, making together the judgment docketed by the clerk, &c." There is no intimation in the receipt, nor does it appear that any was given to the defendant at

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the time he paid the judgment, that an application would be made for a readjustment of the costs.

On the 31st day of May 1851, the attorneys for the plaintiff gave notice to the defendant's attorney that a motion would be made at a special term of this court, thereafter to be held at the court house in Schoharie, for an order referring back the bill of costs to the clerk of the county of Schenectady for readjustment, by allowing to the plaintiff the several charges stricken out by the said clerk. The motion was made and granted by default, but the default was set aside, and the motion is now renewed.

CADY, Justice.—The fee of 50 cents for entering the judgment belonged to the clerk, and he had a perfect right to refuse to insert it in the adjustment of costs. The affidavit of B. F. Potter shows that the cause was called on the first day of the last circuit in Schenectady and the trial postponed at the request of one of the attorneys for the plaintiff, and that the cause was tried on the second day of the circuit, that the three witnesses for whose attendance two days each was claimed, resided in the city of Schenectady, and that one of them did not attend on behalf of the plaintiff. This affidavit shows that the clerk ought to have deducted \$2, instead of \$1.50, from the charge of \$3, for the attendance of three witnesses two days each.

The only remaining item was the charge of \$12.88 for the traveling fees of Jacob M. Schermerhorn.

No affidavit was submitted to the clerk in support of that claim, except that of Edward Rosa, Esquire, in which it was stated "That Jacob M. Schermerhorn, who resides in Homer, Cortland county, duly attended as a witness in this cause on behalf of the plaintiff; that he resides one hundred and sixty-one miles from the city of Schenectady where this cause was tried; that he attended one day and was a necessary witness." The clerk held this affidavit insufficient to warrant any allowance for the travel of Mr. Schermerhorn, and the clerk's decision is fully supported by the opinion of the late Supreme Court in the case of Ehle vs. Bingham (4 Hill, 595; 2 R. S. 653, § 7). It is not claimed on the part of the plaintiff, that he has since the adjustment of the

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costs discovered evidence of any fact not then known, showing that an allowance for the travel of J. M. Schermerhorn ought to be made.

This motion may be regarded as a motion for a new trial as respects the costs; but a new trial is not to be granted because the party who asks for it neglected to bring forward all the evidence in his power to support his claim.

Again, suppose a jury erroneously reject one half the items of a plaintiff's account, but he enters up judgment on the verdict, and receives payment, it will then be too late for him to move for a new trial. Had he intended to move for a new trial he should have done it before he entered judgment on the verdict. So in this case, after the plaintiff knew how the clerk had adjusted the costs, if he then intended to move to have the costs readjusted, he should not have entered judgment for them as adjusted and received payment of the judgment. This as I understand the case is an answer to this motion.

Another answer was given to the allowance of traveling fees to Jacob M. Schermerhorn. The defendant swore that Jacob M. Schermerhorn was the plaintiff in interest as he believed. Benjamin F. Potter, in his affidavit states that the said Jacob M. Schermerhorn was, as he believes, the real plaintiff in this action; and that the plaintiff's attorneys well knew that the said Jacob was the real plaintiff in interest; and that the said attorneys on the day that the judgment was paid deposited the amount of the damages in the Mohawk Bank to the credit of the said Jacob and sent him a certificate of deposit therefor.

Although a party making a motion is not ordinarily allowed to read affidavits in support of his motion, copies of which have not been served, yet in cases where the affidavits read in opposing a motion, introduces new matter which may operate as a surprise upon the moving party, he is sometimes allowed to have the motion stand over for the purpose of obtaining affidavits to contradict or explain the new matter alleged, especially when the new matter may tend to charge the moving party with bad faith; but in this case there was no request for leave to contradict the

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allegation that Jacob M. Schermerhorn was the plaintiff in interest in this cause.

The affidavits on the part of the defendant unexplained, warrant a belief that Jacob M. Schermerhorn was the plaintiff in interest; and if so he could not have been sworn as a witness had he been offered as such. But independent of that objection, I am of opinion that the motion ought to be denied, with ten dollars costs.

SUPREME COURT.

MANDEVILLE, Adm'r, &c. agt. WINNE.

A defendant must answer the complaint within the twenty days, prescribed by statute. He has not a right to answer after the expiration of the twenty days and before judgment is actually taken.

Albany Special Term, July 1851. This was a motion to set aside a judgment and for leave to answer.

The facts sufficiently appear in the opinion of the court.

WM. H. KING, *for Plaintiff.*

H. J. HASTINGS, *for Defendant.*

PARKER, Justice.—The evidence is so contradictory, that I have doubted whether the complaint was served on the 5th or 6th of June. But I think I am bound to hold that the admission of the defendant, proved by the affidavit of Mr. King, outweighs, with the affidavit of the sheriff, the evidence on the part of the defendant, and shows the service to have been made on the 5th June.

The answer then was not served till after the twenty days for answering had expired, viz., on the 26th of June.

It is true the answer was served before judgment was entered, but I do not think it was therefore in time. The Code (§ 130) says "the defendant shall have twenty days to answer." The language is explicit. The time for answering is to be measured by days. No default is required to be entered at the expiration

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of that time, as was formerly the practice. If a rule for default was to be entered it would probably be best to regard the time for answering as extending to the entry of the rule, and to hold the taking of the default as the evidence of the plaintiff's intention to terminate the time for answering. But as no rule is required, and the time is prescribed by statute, both parties understand when the time for answering expires. It is the policy of our present practice to dispense with common rules in the progress of the action. They are no longer deemed necessary, to mark the limit within which a step is to be taken. The default is now deemed to be taken at the end of the twenty days, as effectually as if a rule for that purpose was entered. The judgment is a subsequent step in the cause. A defendant never had the right to plead till judgment was entered but only till default. It is important to the plaintiff to know, before he proceeds to prepare to take judgment, whether a default is perfected. It would subject a plaintiff to great inconvenience and delay, to compel him to receive an answer at any time before judgment, particularly in a case where he applies to the court for judgment. A defendant might lie still till the plaintiff's counsel rose in court to move for judgment, with the witnesses present to prove the amount of damages, and then, by serving an answer, he would stop the proceeding and throw the cause over till another circuit.

I think the only safe practice is to require the defendant to answer within the twenty days. If he can not do so, the time may be extended; and if by mistake the time has elapsed without answering, he may always be relieved on just terms.

The answer then was not served in time; but the defendant swearing to merits, the judgment must be set aside and defendant must have leave to answer on paying costs of judgment and of motion—in all fixed at \$15.

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SUPREME COURT.

WORDSWORTH AND WIFE agt. LYON AND WIFE.

It is not the province of the Supreme Court to interfere *by injunction* to restrain the proceedings of inferior jurisdiction, where a remedy is given by appeal or proceedings in the nature of an appeal.

To authorize the issuing of an injunction under § 209, it must appear that the plaintiff is entitled to the final relief demanded, according to other or pre-existing laws, independently of the Code.

Cure vs. Crawford (5 *Howard*, 293), disapproved of.

Westchester Circuit, June 1851. Plaintiffs had agreed to purchase of defendants a farm in Westchester, and to pay therefor by installments as follows: \$750 at the time of the execution of the agreement, March 12th, 1850; \$250 on the 13th May, and \$1620 on the first of October, when a mortgage was to be given for the residue of the condition, \$6000. The plaintiffs entered into possession and paid the installments prior to the 1st of October. On that day plaintiffs were not ready to perform. The defendants on the 5th day of October commenced proceedings before a justice of the peace under the act "in relation to summary proceedings to recover the possession of land," as amended April 3, 1849, to remove the plaintiffs. Whereupon this suit was commenced to restrain the defendants' proceedings before the justice, and a preliminary injunction obtained. The case now comes on to be heard on pleadings.

W. WORDSWORTH, *in Person*.

J. W. MILLS and J. W. TOMPKINS, *for Defendants*.

BARCULO, Justice.—The plaintiffs rely solely upon the case of Cure agt. Crawford (5 *How. Pr. R.* 293), as an authority for the relief claimed in this action. That case stands alone, and I do not feel at liberty to follow it in the decision of this cause for the following reasons:

1. The proceedings in the present case were instituted before a justice of the peace pursuant to the act of April 3, 1849 which gives an appeal to remove the proceedings before the justice to

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the county court where the judgment may be affirmed or reversed. The act also provides for a stay of proceedings on an appeal by the tenant, upon his giving adequate security. There is not, therefore, in my judgment, any necessity for the interposition of this court by injunction.

2. The Revised Statutes (2 R. S. 516, § 47) provide that the proceedings on any such application shall not be stayed or suspended by such writ of certiorari or *any other writ or order of any court or officer*. This statute is well expounded and applied in the case of *Smith vs. Moffat* (1 Barb. S. C. Rep. 65); and I am unable to discover any thing in the Code which repeals it, either directly or by implication.

3. Section 219 of the Code has not, in my judgment, any application to a case of this kind. It declares that "where it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the plaintiff," &c., a temporary injunction may be issued. The decision in *Cure vs. Crawford* is founded upon a construction of this section. In that case the court refused to dissolve an injunction issued to restrain the landlord, who was proceeding unlawfully to remove the tenant, upon the ground that the act complained of "would produce injury to the plaintiff." It seems to have been assumed that the plaintiff would be entitled on his complaint to the relief demanded, which consisted of a perpetual injunction; and, if the assumption was correct, the decision allowing the preliminary injunction was also correct. But it is true that the plaintiffs in these cases are entitled to the relief demanded? Is it the province of this court to interfere by *injunction* to restrain and regulate the proceedings of magistrates and inferior jurisdictions? I think not. If we can be called upon at all in such matters, except for a writ of prohibition, it must be only in very extraordinary cases, where great injury is to be apprehended and when there is no other adequate remedy. If we issue an injunction to stay proceedings before a justice of the

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peace upon the ground that he is mistaken in supposing that the relation of landlord and tenant exists, why may we not with equal propriety inspect the affidavits upon which warrants and attachments and similar process is issued by these and other officers, and arrest their progress whenever we find them proceeding without jurisdiction. Indeed, if we are to interpose whenever a party is liable to be injured by the decision of an inferior tribunal, it is impossible to say when or where we are to stop. It is certain, however, that we should soon draw into this court an amount of business of this description which would materially interfere with the discharge of more legitimate duties, and which could never have been designed by our modern law givers, who have on all occasions manifested, at least, a reasonable horror of the grasping propensities of courts of equity.

To my mind it is apparent that the "injury to the plaintiff" spoken of in section 219, has no reference to an injury under the forms of law or by virtue of judicial proceedings; and that it does not extend the jurisdiction of this court to proceed by injunction in a case like the present. This section may and probably does authorize a preliminary injunction in some cases of trespass where it could not be granted by the former practice (*Jerome vs. Ross*, 7 *John. Ch.* 315). But it can not by any rule of construction with which I am acquainted, be construed to create new rights of action, or give new remedies; and yet this is the interpretation which must be given to sustain the plaintiff's argument, and such seems to have been the view taken by the court in *Cure vs. Crawford*. The learned justice remarks that the provision of the Revised Statutes which forbids a stay of proceedings to remove a tenant, "is plainly inconsistent with the provisions of the Code *which authorizes an injunction in any case when the act complained of would produce an injury to the plaintiff.*" With all respect, I must be permitted to say, that I think there is some great mistake in this matter. I am not aware of any provision of the Code which attempts to confer any such authority. However, as the beauties of this famous act are daily developing themselves to the cost of thousands of suitors, I will not undertake to affirm

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positively that it does not contain some such monstrosity. But the section under consideration, of which I understand the learned justice to speak, certainly does not give such a power. It gives no authority to grant an injunction except when it shall appear by the complaint *that the plaintiff is entitled to the relief demanded*, in which case a temporary injunction may issue to retain things in *statu quo* until the determination of the suit. The object manifestly is to prevent the defendant from continuing the injury during the litigation, or destroying or impairing the value of the thing sought to be recovered. But in all cases the plaintiff must show himself *entitled to the relief* demanded, and that title rests, not upon the Code, but upon the *preeexisting laws*. If, therefore, according to former decisions the plaintiff in the case of Cure vs. Crawford was not entitled to the *final relief* claimed, he was not entitled to a *preliminary injunction*, by the terms of section 219; and that he was not entitled to such final relief, is very fully and ably shown by the same learned justice in Smith vs. Moffat.

Now in the case before me, the question is not whether a preliminary injunction shall go, but whether a perpetual stay is the proper relief to be granted. My conclusion is that the plaintiff is not entitled to this, or any relief in this suit upon the case made by his complaint. It shows simply that the justice was proceeding without jurisdiction in a matter where his decision could be reviewed and reversed. I assume it to be a well settled doctrine in courts of equity that they will not relieve a party where a question of law has been erroneously decided by a court of law, nor on account of any defect of jurisdiction of the tribunal where the proceedings are pending (*Story Com. on Equity*, § 897-8).

Judgment for the defendant.

Cheney agt. Garbutt.

SUPREME COURT. *8 How 47-49*
CHENEY agt. GARBUTT. *62d 315-316317**5 How 241*

It is not necessary that the complaint should contain the allegations which authorize the defendant's arrest or imprisonment, in order to issue an execution against his person, where he has been arrested after the service of the complaint and before judgment under § 179. (*This is directly adverse to the case of Gridley agt. McCumber, ante page 414*).

At Chambers, Rochester, March 1851. Motion to set aside execution against defendant's person.

The action was commenced by the service of a summons and complaint on the 8th of January 1851. The complaint claimed that the defendant was indebted to the plaintiff on contract in the sum of \$60.84 and interest, for a bill of goods purchased of the plaintiff by the defendant on the 28th September 1850, for which sum, with interest from the time of the purchase, the plaintiff demanded judgment with costs. The defendant did not answer, and the plaintiff, on the 3d February 1851, entered judgment for the amount claimed. An execution was issued against the property of the defendant, which being returned unsatisfied, the plaintiff afterwards issued another to the sheriff of Monroe county against the person of the defendant. The complaint contained no allegation of fraud, or any other matter, which would authorize an execution against the person of the defendant.

On the part of the plaintiff, it is shown that on the 8th day of January 1851 (the day the summons and complaint were served), the defendant was arrested by virtue of an order of a justice of this court under sections 179, 180 and 181 of the Code. Copies of the affidavits upon which the order for the arrest was made, with a copy of the order, were duly served on the defendant on the said 8th of January, and the defendant on the same day put in bail in the action. The grounds of the order to arrest were, 4st. Fraud in contracting the debt; and 2d, that the defendant had disposed of his property with intent to defraud his creditors.

D. D. BROWN and J. D. HUSBANDS, *for Defendant.*

GEO. F. DANFORTH, *for the Plaintiff.*

*This is given authority
see 2 Selden 564 + 7 How 12*

Cheney agt. Garbutt.

WELLES, Justice.—The defendant moves to set aside the execution against his person upon the ground that the complaint contained no allegation which would authorize his being charged in execution upon the judgment; that as there was nothing stated in the complaint which he could deny, or answer, so as to put the plaintiff to a trial, and as the order for his arrest was made on an ex parte application, he has had no opportunity of controverting the allegation of fraud.

The 4th and 5th subdivisions of § 179 of the Code authorize the arrest of the defendant in cases where he has been guilty of fraud in contracting the debt, or incurring the obligation for which the action is brought, &c., or where the defendant has removed or disposed of his property, or is about to do so with intent to defraud his creditors. Upon both these grounds, the order in this case was made.

By § 288, an execution against the person of the defendant may be issued in the cases mentioned in sections 179 and 181. By § 183, the order for the arrest may be made to accompany the summons, or at any time afterwards, before judgment. By § 186, the defendant, at any time before execution, shall be discharged from the arrest either upon giving bail, or upon depositing the amount mentioned in the order of arrest. The bail mentioned is by § 187, to be an undertaking, &c. to the effect that the defendant shall at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, &c. By § 204, a defendant arrested may, at any time before the justification of bail, apply, on motion, to vacate the order of arrest, or to reduce the amount of bail.

Looking at all these provisions, I am satisfied that the plaintiff was regular in issuing the execution against the defendant's person. There is no provision requiring the complaint to contain the allegations, which authorize the defendant's arrest or imprisonment. By § 183, the order for the arrest may be made at any time before judgment. The occasion for the arrest may arise under § 179. sub. 5, and I think also under sub. 1 of the same

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section, the day before the judgment is entered. In such cases, the complaint may have been served before the order of arrest was applied for, and then, according to the argument of the defendant's counsel, it would be impossible to change him in execution at all, because the fact which was the foundation for it, was not, and could not be alleged in the complaint, which was prepared and served before there was any occasion for the arrest or imprisonment.

If the position of the defendant's counsel be correct, that, as a fundamental rule, the complaint should show facts sufficient to authorize the imprisonment of the defendant, in order to change him in execution, so that an issue may be formed upon the existence of such facts, such rule, from its nature, should apply to all cases. But it is seen that such a rule can not be made to apply to the case of an order made after the complaint is served. This, I think, shows that the legislature did not contemplate any different form of the complaint between a bailable and nonbailable action, unless the nature of the action required the difference.

In most of the cases where the defendant may be arrested under § 179, the ground of arrest is something wholly aside from and independent of the cause of action. Section 142 of the Code, which prescribes what the complaint shall contain, requires a statement of the facts constituting the cause of action, &c., and a demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated. The kind of execution is not what is intended by the relief to be demanded in the complaint. The only imaginable use of introducing the facts which are the grounds of the defendant's arrest, into the complaint, where such facts are extraneous to those constituting the cause of action, would be to allow the defendant the opportunity of taking issue upon them, and of trying it as other issues, made by the pleadings, are tried.

I think the legislature have provided a different mode of trying the question, and that is, by an application to vacate the order of arrest under § 204. There may be objections to this mode of trial, and yet it is not without its advantages to the defendant.

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If the order is granted upon insufficient affidavits, the judge upon being satisfied of their insufficiency, will vacate the order. If, unexplained, and uncontradicted, they are sufficient, it is competent for the defendant to contradict them or show other facts entitling him to a discharge by his own affidavit or the affidavits of others. Thus, if he is not liable to arrest, he may have the question settled at once; have his bail exonerated, or his person liberated; and sometimes, it may be, avoid imprisonment from the time of his application to the judge, until judgment.

The motion must be denied, but without costs

How. 470—DRAFTED, 8 How. 874. See 5 Id.
Id. 68, 70.

SUPREME COURT.

WILLIAMS agt. HAYES.

The Code not only abolishes the distinction between legal and equitable remedies, but also establishes a uniform course of proceedings in all cases. Therefore neither the rules by which the sufficiency or insufficiency of pleadings in the common law courts, nor those which were applicable to pleadings in courts of equitable jurisdiction, can be adopted as a sure guide.

The complaint is to contain a statement of the facts constituting the cause of action.

The answer, besides a denial of the allegations of the complaint, may contain a statement of any new matter constituting a defence.

The reply, in addition to a denial of the statements in the answer, may contain allegations of new matter, in avoidance of the answer (*Code*, § 142, 149, 153). Whatever statements may be found in either of these pleadings beyond this, are redundant and irrelevant. And this too, whatever the nature of the action, whether under the system, now abolished, it would have been a case of legal or equitable cognizance.

The criterion is, whether the allegation in the pleading can be made the subject of a *material issue*. That is, the statement of such facts as constitute a cause of action, or a defence, or in case of a reply, such facts as will avoid a defence. Not a statement of the evidence, or, which is the same thing, facts which constitute evidence of an essential fact in the case. (*The doctrine in the case of Knowles agt. Gee*, 4 How. Pr. R. 317, concurred in. See also *Shaw agt. James*, id. 119; *Glenny agt. Hutchins*, id. 98; *Russell agt. Clapp*, id. 347; *McMurray agt. Gifford*, ante page 14.)

It is the right of the adverse party to have the matter improperly inserted in the pleading, removed, so that the record, when complete shall present nothing but the issuable facts in the case. (*The case of Hynds agt. Griswold*, 4 How. Pr. R. 69, explained, and modified. *The case of Carpenter agt. West*, ante page 53, concurred in.)

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Rensselaer Special Term, January 1851. Motion to strike out irrelevant and redundant matter. The action was brought to restrain the defendant from foreclosing a mortgage executed by the plaintiff and his wife to one Boughton, and to have the same cancelled. The complaint states that on the 7th of April 1838, the plaintiff and his wife mortgaged certain premises to Boughton to secure the payment of \$250; that Boughton died in 1846, and that, before his death, the mortgage had been fully paid; that after the death of Boughton the mortgage came into the possession of the defendant, who claims to be the owner and assignee thereof, and is seeking to foreclose the same. The complaint then proceeds to state that Boughton had, in his life time publicly stated that the plaintiff had paid up the mortgage, and that he was indebted to the plaintiff; that the only reason why the mortgage had not been legally discharged was, that the parties, being ignorant of the law, had not deemed it necessary; that after the mortgage had come into the possession of the defendant, he had sold it to one Greenman, representing that there was still due thereon \$54; that Greenman having ascertained that the mortgage had been paid and that its payment could be proved, sued the defendant to recover back the amount paid for the mortgage, and before the trial the defendant refunded to Greenman the amount paid by him, and received the mortgage back; that after this the defendant had offered to sell and deliver the mortgage to the plaintiff for \$30, which the plaintiff, to avoid litigation, had agreed to pay, upon condition that the defendant would execute an instrument whereby it might be legally discharged, which the defendant refused to do; that before the death of Boughton he and the plaintiff had, for six years or more, dealt largely together and had not settled; that they were about settling when Boughton died; that plaintiff has but little property, and if the defendant is permitted to enforce the mortgage, the plaintiff will be left nearly, if not entirely destitute.

All these statements, subsequent to the allegation that the defendant is seeking to foreclose the mortgage, the defendant moved to strike out as redundant or irrelevant.

Williams agt. Hayes.

E. R. PECK, *for Plaintiff.*BINGHAM & McCLELLAN, *for Defendant.*

HARRIS, Justice.— A prominent object of the reform instituted by the Code was “*to simplify and abridge pleadings,*” to substitute for the unmeaning forms, and prolix statements with which pleadings, both at law and in equity, had been incumbered, a simple statement of the facts which constitute the cause of action, or the grounds of defence, in such a manner as to present to the court the precise points in dispute, and when the controversy is ended, to preserve a record of the precise matters determined. Hence it is specifically required, in respect to all pleadings, that the matter to be alleged shall be stated in “ordinary and concise language.” The complaint is to contain “a statement of the facts constituting the cause of action.” The answer, besides a denial of the allegations of the complaint, may contain a statement of any new matter constituting a defence. In like manner the reply, in addition to a denial of the statements in the answer, may contain allegations of new matter, in avoidance of the answer (*Code*, § 142, 149, 153). Whatever statements may be found in either of these pleadings beyond this, are redundant or irrelevant; and this, too, whatever the nature of the action; whether under the system, now abolished, it would have been a case of legal or equitable cognizance. It was the avowed object of the legislature, in adopting the Code, not only to abolish the distinction between legal and equitable remedies, but to establish an uniform course of proceeding in all cases (see preamble to the Code). Under such a system, neither the rules by which the sufficiency or insufficiency of pleadings in the common law courts, nor those which were applicable to pleadings in courts of equitable jurisdiction, can be adopted as a sure guide. The principle by which questions of this description are to be determined under the present system, has been exceedingly well stated by Mr. Justice SELDEN, in *Knowles vs. Gee* (4 *Howard*, 317). The facts which pleadings under the Code are to contain are, he says, “issuable facts—facts essential to the cause of action, or defence,

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and not those facts and circumstances which merely go to establish such essential facts." (See also *Shaw vs. Jaynes*, 4 *Howard*, 119; *Glenny vs. Hitchins*, *id.* 98; *Russell vs. Clapp*, *id.* 347; *McMurray vs. Gifford*, 5 *id.* 14.) The criterion in every such case is, I think, whether the allegation in question can be made the subject of a *material issue*. If it can, it has a right to be found in the pleadings; if not, it ought not to be there. The rule may be illustrated by the case under consideration. A material fact stated in the complaint is, that the mortgage in question has been paid. Upon this allegation a material issue might be made. Upon this issue, it would be very pertinent to prove another allegation in the complaint, that the mortgagee had in his life time, publicly stated that the mortgage was paid. This would be evidence tending to show that the mortgage was in fact paid; but could a material issue be made upon the latter allegation? Whether the mortgagee had said so or not, is only important as it may furnish evidence upon another issue, that is, whether the mortgagee had, in fact, been paid or not. In the language of Justice SELDEN, "it is a fact which merely goes to establish the *essential fact*," namely, that the mortgagee is really paid. The Code has no where provided that evidence, or, which is the same thing, facts which constitute evidence of an essential fact in the case, may be inserted in any pleading. On the contrary it limits pleadings to the statement of such facts as constitute a cause of action or a defence; or, in case of a reply, such facts as will avoid a defence.

The learned judge whose doctrine, as stated in *Knowles vs. Gee* (4 *Howard*, 317), I am so willing to adopt, has, in a more recent case himself laid down a different rule. In *The Rochester City Bank vs. Suydam* (5 *Howard*, 216), he has held that "the statement of facts in the complaint, should be in conformity with the nature of the action. If the case and relief sought be of an equitable nature then the rules of chancery pleading are to be applied; otherwise those of the common law. With great deference, I am constrained to dissent from this conclusion. It was not the intention of the legislature, in adopting the Code, to con-

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tinue the distinction between common law and equity pleadings. On the contrary, it was intended that there should be but one system of pleadings. It was not intended that the rules of common law pleading should be applicable to one class of cases, and those of chancery pleading, to another. On the contrary, it was intended that neither the rules of common law pleading, nor those of equity pleading, should be exclusively applicable to any case of pleading under the Code. In every case the criterion, by which to judge of the sufficiency or insufficiency of the pleading, is to be the same. Whether the case is one of an equitable nature, or of common law jurisdiction, so far as the pleading states facts essential to the cause of action, or the defence, or to avoid the matter of the defence, so far it is unobjectionable; whatever else it contains, is redundant or irrelevant, and may properly be stricken out. If I am right in this view of the question, it follows that matters of evidence, or as it is expressed by Justice Selden, "the facts and circumstances which go to establish *the essential facts* in the case, ought not to be inserted in the pleadings. The very language in which the Code has prescribed what the several pleadings which it allows shall contain, seem to exclude from such pleadings all mere matters of evidence. My own experience, and I think that of every other judge, as well as that of the bar, has proved that it is wise, if not absolutely necessary, if we would give practical efficiency to this novel system, to confine the pleadings to their legitimate office, and whenever the opportunity is presented, to disencumber them of the unnecessary matter, with which they are now so frequently crowded. By this means alone, I am fully persuaded, can the system of pleading be rendered useful or even tolerable, and the end for which it was adopted, that of simplifying and abridging pleadings, be attained.

If the principle stated is to be applied to the case before me, this motion must be granted. Striking out all the matter embraced in this motion, it leaves the complaint still containing a statement of all the facts constituting the plaintiff's cause of action. The matter which it is proposed to strike out, consists of facts and circumstances, which, if proved, would tend to sustain



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an issue upon the material facts alleged; but which if denied, would not themselves present a material issue for trial. Some of these facts and circumstances might properly be proved, if issue were joined upon the material facts in the case, and some of them would not be competent even as evidence. Such allegations can render no useful service. They only tend to encumber the pleadings, and render them complex and prolix. They ought, therefore, to be struck out.

I was referred upon the argument to what I have myself said, in *Hynds vs. Griswold* (4 *Howard*, 69), in support of the position, that if, upon the trial, it would be pertinent for the plaintiff to prove the facts alleged, they could not be deemed irrelevant. Perhaps the language I have used in that case, requires some qualification. All I intended to assert was, that facts which might be material to the issue, as tending to aggravate or mitigate damages, might properly be stated in the pleadings, though not necessary to constitute a complete cause of action; or, in case of an answer not constituting a complete defence. The language of that opinion requires to be qualified in another particular. When it is said that before matter can be stricken out of a pleading it must not only appear to be redundant or irrelevant, but also that some party is aggrieved or prejudiced thereby, it would seem to be a fair inference that before such a motion could be granted it must be shewn, in support of the motion that some actual injury would result to the moving party, if the matter sought to be expunged was suffered to remain. If such a construction is to be given to the opinion, it is certainly erroneous. I concur entirely in the view taken of this question, by Mr Justice HAND in *Carpenter vs. West* (5 *Howard*, 53). It is not every unnecessary expression or redundant sentence, which should be expunged on motion. But where entire statements are introduced upon which no material issue can be taken, the opposite party may be "aggrieved" by allowing them to remain in the pleading. If not answered, it may be claimed that such allegations are admitted, and if denied, the record is embarrassed with immaterial issues. In all such cases, it is the right of the adverse party to have the

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matter, improperly inserted in the pleading, removed so that the record, when complete, shall present nothing but the issuable facts in the case. This I understand to be the true spirit and general policy of the system of pleading prescribed by the Code.

The motion in this case must be granted with costs.

SUPREME COURT.

AVERILL agt. TAYLOR and VERNON surviving Executors.

No part of an answer ought to be struck out which can in any event become material.

It seems, that in a suit brought to have a bond and mortgage delivered up and canceled, the defendant may ask for and, if successful, may have the positive relief of a foreclosure, and in such case may in his answer require that all persons interested shall be made parties.

The prayers of the defendant in his answer can not prejudice the plaintiff and will not be struck out on motion. (*See Williams agt. Hayes, ante page 470.*)

It seems that foreign executors may foreclose a mortgage in this state without asking out letters testamentary here.

Saratoga Special Term, December 1850. This was a motion to strike out certain parts of the defendants' answer for irrelevancy, impertinence and immateriality, and was made on the complaint and answer, and on a short affidavit stating the time of serving the same. The suit was brought for an injunction to restrain the defendants from proceeding with a statute foreclosure of a certain bond and mortgage, conditioned for the payment of a sum of money; and to have the bond and mortgage delivered up and cancelled. The complaint stated, in substance, that Jesse Averill, the plaintiff, executed the bond and mortgage to Marvin Averill, his brother, under an agreement that, if Jesse should support their parents during the natural life of each, then he should not be obliged to pay said bond and mortgage; that Jesse had fulfilled said agreement, and that several years afterwards Marvin had expressed himself satisfied with such fulfillment, and had promised to cancel the bond and mortgage; that as the plaintiff was informed, Marvin had died without canceling the bond and mortgage, but had, by his will, bequeathed or released the same to Jesse; that the defendants had never taken out letters testamentary in this state,

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but that they pretended to be the executors of Marvin, appointed by the aforesaid will, and were foreclosing the mortgage by advertisement.

The answer denied the alleged agreement; the fulfilment of the same by Jesse, and the subsequent promises of Marvin; set forth the will containing the alleged bequest or release; alleged that Marvin was insolvent at the time of his death, and that the defendants were his surviving executors; admitted that they had not taken out letters testamentary in this state, and that they were foreclosing by statute; alleged also that prior to the commencement of the suit, Jesse had sold and conveyed a part of the mortgaged premises to A. E. Smith, who was still in possession thereof; and prayed that Smith might be made a party to the suit, and that the defendants might have a decree of foreclosure against the plaintiff and said Smith, when made a party.

J. W. & L. E. THOMPSON, *for Plaintiffs.*

LEARNED & WILSON, *for Defendants.*

CADY, Justice.—The insolvency of the testator at the time of his death may be a material question in the cause, if the plaintiff shall rely at all on the bequest in the will, in his favor; for debts are to be paid before legacies (2 R. S. 90, § 44 and 45; Lupton, vs. Lupton, 2 *John. Ch. Rep.* 614). That part of the answer, therefore, ought not to be struck out, if it can in any event become material.

The next part of the answer relates to the fact that the plaintiff and his wife have conveyed a part of the premises to A. E. Smith, and the necessity of his being made a party. If it were certain that the plaintiff is entitled to have the bond and mortgage given up and cancelled, and that the defendants could not have in this suit a decree of foreclosure and for a sale of the mortgaged premises, there would be no necessity for making A. E. Smith a party; but if, upon this bill, the defendant can have a decree of foreclosure and to sell the mortgaged premises, then A. E. Smith is a necessary party. I am not prepared to say whether such decree can or can not be made in a case like this; but I do not perceive any good reason against it.

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The remaining matter which the plaintiff moves to have struck out consists of the defendants' prayer. It is not possible that the plaintiff should be prejudiced by the defendants' prayers. They do not require a reply; no issue can be taken on them; they are addressed to the court, and will not be granted unless, upon the hearing the facts and law of the case, the party be entitled to the relief prayed for.

The objection that the defendants have no right to advertise to sell the mortgaged premises by virtue of the power contained in the mortgage before having taken out letters testamentary in this state, seems to be answered by the case of *Doolittle vs. Secors* (7 *John. Ch. Rep.*, 45). It may, however, be that Chancellor Kent's opinion in that case rests, in part, upon the fact that the mortgagor suffered the sale to be made, without objection, and bona fide purchasers became interested, and that they ought to be protected. That circumstance does not exist in this case; but why should the mortgagor be allowed to object to the execution of a power which he gave? There is no suggestion in the complaint that there are any creditors of the testator in this state, who may be prejudiced by permitting the defendants to proceed with the sale. I am, therefore, of opinion that the motion be denied with ten dollars costs, to be paid by the plaintiff to the defendants or their attorneys.

How. 478—See 7 How. 197.

COURT OF APPEALS.

BANK OF GENEVA agt. HOTCHKISS AND HOTCHKISS.

The time for bringing an appeal (two years) begins to run from the making of the final order determining the rights of the parties in the action; that is, from the time of *making* the final order for judgment, and not from the time of docketing the judgment roll.

Held, that the 331st section of the Code should receive the same construction as was given to the former statute (2 *R. S.* 594, § 21), in respect to the limitation of bringing appeals.

Although it may be necessary to have the costs adjusted and roll filed, before bringing the appeal (*McMahon and wife agt. Harrison, ante page 360*), the appellant has it in his power to coerce this to be done in time.

June Term, 1851. This was an action of assumpsit com-

Bank of Geneva agt. Hotchkiss and Hotchkiss.

menced in 1846. It was referred to Robert Monell, sole referee, 19th October 1846, and heard before the referee 27th Nov. 1846. A report was made for plaintiff for \$5151.47, damages and costs, 28th November 1846. A case was made and stay of proceedings ordered and motion to set aside report, made in Supreme Court. An order denying motion, made at general term held in Rochester, Monroe county, 29th January 1849. Judgment record filed in Ontario, 20th March 1849, and judgment docketed.

Notice of appeal served by mail, 15th March 1851, addressed to plaintiff's attorneys at Geneva, and to the clerk of Ontario at Canandaigua, which was filed 17th March 1851.

February 18, 1849, order in Supreme Court at a special term in Wayne county, "that a statement of the facts embraced in the case be made and settled under the direction of one of the judges of the Supreme Court, and that the same be incorporated in the record by the plaintiff's attorneys."

The statement was afterwards made but not perfected or incorporated until subsequent to the 17th March 1847.

This is a motion to dismiss the appeal, on the ground that it was not brought within the time allowed by statute.

RUGGLES, Ch. J.—By the statute in force before the adoption of the Code of Procedure, writs of error were required to be "brought within two years after the rendering of the judgment or final determination," to be recovered, "and not after" (2 R. S. 594, § 21). The period of two years was counted from the time when the final determination between the parties were made, and not from the subsequent filing of the judgment record (11 *Wend.* 522; 4 *Hill*, 29, *Lee vs. Tillotson*). In the last mentioned case there was a report of referees in favor of the plaintiff in 1837. A motion was made in January 1840 in behalf of the defendant to set aside the report, and the motion was denied, but the record of judgment was not filed until the 21st January 1841. It was adjudged that the limitation began to run from the time the motion to set aside the report of referees was denied, and not from the time of filing the record.

By the Code, § 331, an appeal "must be taken within two

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years after the judgment." "A judgment is the final determination of the rights of the parties in the action" (*Code*, § 245). The 331st section ought to receive the same construction which was given to the former statute; the limitation should be counted from the time the final determination was actually made. In the present case it was made on the 29th of January 1849, and the appeal was not taken until March 1851. More than two years had elapsed and the appeal was therefore too late.

It was decided at the last term of this court that an appeal could not regularly be brought until the costs were ascertained and the judgment roll filed. But the party desiring to appeal may compel the other, by motion, to perfect his judgment if he omits to do so; and it is the appellant's own fault if he permits the time to elapse without causing the roll to be filed.

The clerk of the county where the general term is held must necessarily make and keep an entry of the final order of the court; and this ought to specify the relief granted or other determination of the action (*Code*, § 280). This entry shows when the final determination is made, and regulates the time allowed for appealing. For the purpose of perfecting the judgment the prevailing party must cause this order to be entered in the judgment book kept by the clerk of the county where the action is brought and the other proceedings are filed (§ 281). But the time allowed for bringing the appeal is not affected by a delay in entering the order in the judgment book.

Although this suit was commenced before the adoption of the Code, the judgment appealed from was rendered afterwards. The appeal, therefore, is regulated by the Code not only as to the mode of procedure but as to the time within which it must be taken. Appeal dismissed with costs.

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In actions for tort, commenced before the Code, a defendant on whom process was not served, and who has not appeared, can not be a witness for a codefendant whom he is liable to indemnify in case of recovery. *Dodge agt. Averill*, 8.

he is nominally a party and interested. *id.*

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Several causes of action in slander can not be united, unless they are separately stated (see *Slander and Pleading*.) 171.

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An action to recover personal property can not be maintained where the defendant has not, in fact or in law, the possession or control of the property claimed. *Roberts agt. Randel*, 327.

see further *Claim and Delivery*.

ADMISSION, see *Service of Papers*, 342.

AFFIDAVIT OF MERITS, an affidavit of "a defence in the action," without swearing to merits, or advice of counsel, is insufficient under Rule 39. *McMurray agt. Thomas*, 14.

An affidavit of merits for the purpose of being let in to defend in a common law action, is not required to be *special*, where there is no suspicious circumstance in the case. *Dix agt. Palmer*, 234; and *Van Horne agt. Montgomery*, 238.

AMENDMENT, the plaintiff has no right to amend his complaint by striking out the name of one or more parties, without leave of Court. *Russell agt. Spear*, 142.

see *Answer*, 206.

Amendment of summons will not support a judgment which is irregular on account of defect in original summons. *James agt. Kirkpatrick*, 241.

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Although § 172 of the Code allows an amendment of a pleading once, of course, and without costs, yet as to costs it can apply only where the first pleading has been regular. *Williams agt. Wilkinson*, 357.

if the opposite party has prepared and served motion papers to set aside the first pleading for irregularity, which is cured by amendment, the party amending must pay costs. *id.*

An answer can not be amended in matters of substance, where it sets up title, and is the same put in before a justice of the peace to remove a cause. *Wendell agt. Mitchell*, 424.

see *Party, Davis agt. Schermerhorn*, 440.

ANSWER, an answer is bad where it controverts no allegation of the complaint, and sets up no new matter in bar, but merely denies a conclusion of law. *McMurray agt. Thomas*, 14.

an answer is bad, which merely alleges that the note sought to be recovered was obtained by fraud, and omits to set out any facts showing the existence of such fraud, *id.*

Where an answer merely denies the facts set up in the complaint, and contains no new matter constituting a defence, plaintiff is not bound to reply thereto. *Brown agt. Spear*, 146.

see *Judgment, Tracy agt. Humphrey*, 155.

Facts which, under the former practice, would have formed ground of relief against a legal demand, upon a bill filed for that purpose, may now be interposed by way of answer in the action on the legal demand. *Burget agt. Bissell*, 192.

Where an answer and demurrer were served on one paper, and reply served to the answer and the demurrer noticed for argument, and afterwards the answer was again served as an amended answer without the demurrer, held plaintiff was not bound to reply again. *Howard agt. Michigan Rail Road Co.*, 206.

To authorize an order upon a motion to strike out an answer as frivolous, it must appear that the answer is a "sham pleading" (*Code* § 152), which does not necessarily follow from its being merely frivolous. *Darrow agt. Miller* 247.

no affidavit need be served on the opposing party with notice of motion for judgment under § 247 *id.*

Where answer admitted execution of note, but as to each and every other allegation, denied sufficient knowledge, &c., (the complaint alleging facts upon which defendant became liable), held, that answer was sufficient. *Genesee Insurance Co. agt. Moynihan*, 321.

see *Service of papers, Graham agt. McCoun*, 353.

An answer in the nature of a plea *puis darrien*, will not be allowed after two trials, where defendant had knowledge of the facts before answering. *Houghton agt. Skinner*, 420.

see *Amendment*, 424.

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A defendant must answer the complaint within the twenty days prescribed by statute. He has no right to answer after the expiration of the twenty days, and before judgment is actually taken. *Mandeville agt. Winne*, 461.

No part of an answer ought to be struck out which can in any event become material. *Averill agt. Taylor*, 476.

defendant may by way of answer, pray for specific relief on his part, in relation to the subject matter of the suit. *id.*

see *Williams agt. Hayes*, 470.

APPEAL, from decision of motion on frivolous demurrer. *King agt. Stafford*, 30.

see *Judgment, King agt. Stafford*, 30.

from a Justice's court taken before the Code. *People ex rel Cahoon agt. Dodge*, 47.

Notice of appeal should be served on the attorney of record in the court below, not on the party. *Tripp agt. De Bow*, 114.

the service of such notice being a jurisdictional question, the party can take advantage of it at any time, if he has not appeared so as to give jurisdiction. *id.*

see *Case and Bill of Exceptions*.

Review in causes referred before the Code. *La Wall agt. Grigg*, 158.

The party deeming himself aggrieved by the decision of commissioners to appraise rail road damages, must bring the matter before the court on appeal; and upon such appeal the court can only look at the matters contained in the report. *N. Y. and Erie Rail Road agt. Corey*, 177.

An appeal brought on the same day that judgment roll was filed, but previous thereto and before the hour when the costs were adjusted, held good. *Blydenburgh agt. Cotheal*, 200. (*Court of Appeals*.)

Where judgment of court below had been paid before writ of error brought but not satisfied of record, on reversal plaintiff can not have restitution without leave of court. *Sheridan agt. Mann*, 201.

It is too late to question the truth of statements in the papers for the first time on the argument of the appeal. *Munson agt. Hagerman*, 223.

The time of service of notice of appeal under § 327, upon the clerk, when made by mail, does not date from the time of depositing in the post office. *Crittenden agt. Adams*, 310.

where such notice was served on the clerk and attorney on the last day for bringing the appeal, by depositing in the post office, and were not received by either until two days after the time for appealing had expired, held that the appeal was not taken in time; the service was good upon the attorney (§ 408) but bad upon the clerk. *id.*

under § 173 of the Code, the court have power to authorize an appeal, taken after the expiration of the time limited by the Code (§ 332 and 348), to be considered good and valid. *id.*

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In respect to causes originating in a Justice's Court, the Supreme Court has merely an appellate jurisdiction. It has no power to review a judgment rendered by a County Court by default. *Dorr agt. Birge*, 323.

It seems, that by § 405, the time to appeal can in no case be enlarged, *Rosell agt. McCormick*, 337.

see to the same effect. *Enos agt. Adams*, 361.

Contra see *Crittenden agt. Adams*, 310.

from surrogate (see *Surrogate*), 351-360.

from referee's report, (see *Review of Referee's Report.*)

from an order granting an attachment, (see *Attachment*), 366.

On bringing an appeal from a Justice's Court, the payment of the justice's fee for the return must be made at the time of service of the notice of appeal. *VanHusen agt. Kirkpatrick*, 422.

To the Special Term.

an appeal will not lie in the first instance to the general term upon a case containing question of *fact alone*. Application for a new trial must first be made at the special term. *Collin's agt. Albany and Schenectady Rail Road*, 435.

see *Leggett agt. Mott*, 4 *How. Pr. R.* 325; *Lusk agt. Lusk*, *id.* 418; *Graham agt. Milliman*, *id.* 435.)

The time for bringing an appeal to the Court of Appeals begins to run from the making the final order for judgment, and not from the docketing of the judgment roll. *Bank of Geneva agt. Hotchkiss*, 478.

Although it may be necessary to have the costs adjusted and roll filed before bringing the appeal, the appellant has it in his power to coerce this to be done in time. *id.*

APPEARANCE, a defendant can not be legally tried upon an indictment for any offence in his absence, unless he has unequivocally waived his right to be present. *People agt. Wilkes*, 105.

see *Lunatic*, 109.

APPRAISAL OF DAMAGES, (see *Practice and Appeal*), 177.

ARBITRATION, upon a parol submission, or under a common law arbitration, the arbitrators possess no power to administer a legal oath. *People agt. Townsend*, 315.

ARREST AND BAIL, an affidavit for the arrest of a defendant, for fraud, &c. must state *positively* facts within the knowledge of plaintiff. And where facts necessarily rest upon information, the source and nature of the information should be set out, and reasons given why a positive statement can not be procured. *Whitlock agt. Roth*, 143.

(see *Claim and Delivery*), *Van Neste agt. Conover*, 148, 327.

Where an order of arrest is granted, on showing that a sufficient cause of action exists (§ 179 and 181) the defendant, upon affidavits

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(204 and 205) is not entitled to have the order vacated, upon the ground that no special cause for requiring bail is set up in the plaintiff's affidavit, upon which the order was granted. *Baker agt. Swackhamer*, 251.

if the judgment does not show that the action is wholly in tort, a *ca. sa.* can not issue, founded upon the order of arrest simply. *Gridley agt. McCumber*, 414.

(*Contra*, see *Cheney agt. Garbutt*, 467.

ASSESSMENT OF DAMAGES, (see *Practice*,) *King agt. Stafford*, 30.

Where defendant has appeared but not answered, in an action for the recovery of money only, and complaint is verified, he is not entitled to notice of assessment. *Dix agt. Palmer*, 233.

Where complaint is not verified, notice of assessment must be given, where defendant has appeared. *Van Horne agt. Montgomery*, 238.

ASSIGNMENT, (see *Party*) 369.

ATTACHMENT, (see *Non resident*,)

where an affidavit for an attachment sets forth enough to call upon the officer for the exercise of his judgment, it is enough to give jurisdiction. *Conklin agt. Dutcher*, 386.

Attachment generally, *id.*

ATTORNEY'S LIEN, (see *Lien*,) 339, 347.

BURIAL GROUNDS, *Schoonmaker agt. Dutch Church of Kingston*, 266.

CASE AND BILL OF EXCEPTIONS, it is almost a matter of course to allow (on motion) a case to be incorporated into the judgment roll upon report of referees, where questions of law are involved. A rehearing may be granted on such a motion. *Nones agt. Hope Insurance Co.*, 157.

if questions of fact alone are involved, a motion for rehearing should be made at a special term. *id.*

see *Appeal*, 435.

CERTIORARI, where a common law certiorari issued against a corporation, who neglected to appear and make return thereto, *held*, that a writ of sequestration ought not to issue until a distringas should be tried. *People ex rel Griffin agt. Brooklyn*, 314.

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In re Saratoga and Western Rail Road Company, &c., 378.

a certiorari will not lie to the trustees of a school district where a remedy is given by appeal. *id.*

a superedeas may be granted before return of certiorari. *id.*

CLAIM AND DELIVERY OF PERSONAL PROPERTY, in an action, for the recovery of personal property, the defendant is liable to be arrested, if the property has been removed, concealed or disposed of
Van Neste agt. Conover, 148.

Contra, Roberts agt. Randel, 327.

in such case defendant can be discharged, only on giving bail in double the value of the property, and that not only for the appearance of the defendant but for the return of the property. *id.*

An action to recover personal property can not be maintained where the defendant has no possession or control of the property claimed. An order for arrest can not be granted in such a case. *Roberts agt. Randel*, 327.

The "claim and delivery of personal property" under the Code is a substitute for *replevin*, and is limited by the same rules. *id.*

COMPLAINT, what facts should be stated in a complaint against the makers and endorsers of a promissory note, where they are all united in the same action, under § 120 of the Code. *Spellman agt. Weider*, 5.

After demand of copy complaint, plaintiff should be allowed twenty days for the service. *Colvin agt. Bragden*, 124.

see *Amendment*, 142.

see *Pleading*, 188.

The general allegation "that plaintiffs are an incorporated company, organized pursuant to the act," &c., is sufficient to show a legal corporation. *Oswego and Syracuse Plank Road agt. Rust*, 390.

subscribers to stock of a corporation can not question its capacity to appear upon the record. *id.*

If plaintiff neglect to bring cause to trial, upon an issue of fact, the defendant may move to dismiss complaint. *Cusson agt. Whalon*, 302. but he need not notice the same for trial until a reasonable time after the time to amend has expired. *id.*

see *Arrest and Bail*, 414, 467.

A complaint containing six counts on same cause of action, all the counts but one will be stricken out. *Stockbridge Iron Co. agt. Mellen*, 439.

CONFESSION OF JUDGMENT, a justice of the peace had no jurisdiction to take judgment by confession for a sum greater than \$100, by Code of 1848. *Daniels agt. Hinkston*, 322.

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Where a confession of judgment commenced with the title of the cause and then proceeded thus, "judgment is hereby confessed in this cause for the sum of \$1413, &c." the statement being signed and sworn to by defendant, held sufficient. *Park agt. Church*, 381.

CONFIDENTIAL COMMUNICATIONS, the rule prohibiting the disclosure of confidential communications from client to attorney, how far it extends. *Rochester City Bank agt. Suydam*, 254.

where an attorney has an interest in the facts communicated, he is exempted from the obligation of secrecy, *id.*

CORPORATION, (see *Complaint*.) 390.

COSTS, the costs allowed to the prevailing party in a summary proceeding to recover the possession of land, are merely the fees of those officers who are required to perform the services, such as the judge, sheriff, constable, &c. *Patridge agt. Ford*, 21.

attorneys and counsel fees are not recoverable in such proceeding against the adverse party. *id.*

Where in an action for libel two defendants defend by the same attorney, and answer separately and verdict in their favor, but one bill of costs and one set of charges can be allowed. *Tracy agt. Stone*, 104.

Costs of motion, see *Notice*, 134.

An adjustment of costs, without motion, does not render the judgment irregular. The adjustment only is irregular, and that may be cured by readjustment. *Dix agt. Palmer*, 233.

The sum \$10 "for every circuit at which the cause is necessarily on the calendar and not reached, or is postponed" (§ 307, subdivision 8), is not allowable to the prevailing party, where the cause was postponed at his request and for his benefit. *Hinman agt. Bergen*, 245.

Plaintiff in interest, though not a party to the record, is liable for costs. *Giles agt. Halbert*, 319.

Where two defendants appear separately and each demurs to the complaint, and both demurrers are allowed, each defendant is entitled to costs. *Collomb agt. Caldwell*, 336.

costs on allowance of demurrer. *id.*

a motion for readjustment of costs should be made without delay. *id.*

Double costs, when allowed. *Calkins agt. Williams*, 393.

The statute giving double costs is repealed by the Code.—**PARKER, Justice**—see 4 *How. Pr. R.* 239. (There are adverse decisions upon this point in other districts—(see 4 *How. Pr. R.*) *Van Rensselaer agt. Kidd*, 242.

it is too late to make application for double costs or an extra allowance, after judgment at the general term on appeal. *id.*

see *Fees*, 458.

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Extra allowance.—All litigated trials are difficult or extraordinary, and percentage should be allowed, *Dyckman agt. McDonald*, 121.
 the application should be made to the justice who tried the cause, *id.*
 Extra allowance should be allowed in all referred causes, because they are litigated, *Niver agt. Rossman*, 153.
 the application should be made in the court where judgment is rendered, unless some special reason exists for applying elsewhere, *id.*
 The court should discriminate in litigated actions between "difficult and extraordinary" and "common and ordinary," *Fox Adm'r, agt. Gould*, 278.
 see to same effect, 4 *How*, 416, and *ante Dexter agt. Gardner*, 417.
 (see *Contra, ante*, 121 and 153.)
 Plaintiff claimed \$300 on account, and recovered less than \$100. Extra allowance denied, *Fish agt. Forrance*, 317.

COUNTY CLERK, what fees a county clerk is entitled to under the Code, as clerk of the Supreme Court, 11.
 (see *Appeal*.) *Crittenden agt. Adams*, 310.
 see *Fees*, 458.

COUNTY JUDGE, a county judge has power, independent of the Code, to grant an order extending the time to answer, *Pebbles agt. Rogers*, 206.
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COURT OF APPEALS, decisions September Term, 1848, 40, 77.

Service of notice of justification of sureties, in an undertaking, when made by mail, should be double time, ten days, Dresser agt. Brooks, 75.

if such service would carry the time of justification beyond the ten days required by § 341 of the Code, it should either be made personally, or a judge's order obtained extending the time, *id.*

the non payment of costs of the dismissal of an appeal, is ground for staying proceedings on a second appeal in the same cause, until such costs are paid, *id.*

Where judgment is pronounced in open court, holden by eight judges, without any dissent at the time, neither party can go behind such public act and attack the judgment on the ground of what may have taken place among the judges in their private consultation, *Mason agt. Jones*, 118.

when the court has jurisdiction, its judgment is never void because it is erroneous in point of law, *id.*

it seems, there is no doubt of the right of the court to order a judgment of affirmance where there is an equal division of opinion among the judges. Besides, the Code of 1849 (§ 14, which is not unconstitutional), expressly authorizes it, *id.*

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A decree at general term reserving no questions; nothing to be done but to compute the amount due, was, under the former practice, a *final* decree, for the purpose of appeal. And under the Code such a decree becomes final, for the like purpose, *after* the referee's report is confirmed, *Swarthout agt. Curtis*, 198.

where the rule for confirmation is entered by default, at special term, the merits of that order can not come under review upon the appeal, *id.* An appeal brought on the same day that the judgment roll was filed, but previous thereto, and before the hour for which the costs were adjusted, held good, *Blydenburgh agt. Cotheal*, 200.

An order of the Supreme Court denying a motion for stay of proceedings on the judgment and for liberty to move to set aside a report of referee without an appeal, or for an order extending the time to appeal, is not an appealable order, *Enos agt. Thomas*, 359.

An appeal from a judgment of the Supreme Court, reversing an order of a surrogate, with costs, is premature, if brought before the amount of costs are ascertained and roll filed; whether a stay of proceedings is sought or not, *McMahon agt. Harrison*, 360.

The time for bringing an appeal (two years) begins to run from the making the final order determining the rights of the parties in the action, that is, from the time of *making* the final order for judgment, and not from the time of docketing the judgment roll, *Bank of Geneva agt. Hotchkiss*, 478.

Held, that the 331st section of the Code should receive the same construction as was given to the former statute (2 R. S. 594, § 21), in respect to the limitation of bringing appeals, *id.*

although it may be necessary to have the costs adjusted and roll filed, before bringing the appeal (*McMahon and wife agt. Harrison*, *ante* page 360), the appellant has it in his power to coerce this to be done in time, *id.*

DECREE, when final, *Swarthout agt. Curtis*, 198.

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the plaintiff, in case of a demurrer and answer to the same pleading, can not move for judgment on account of the frivolousness of the demurrer, *id.*

decision on frivolous demurrer is a judgment. *King agt. Stafford*, 30.

The objection that summons was not properly served, is not available by answer or demurrer, see *Practice*, 96.

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Demurrer for non joinder of parties is well taken where it appears that the court can not determine the controversy without prejudice to the rights of others, nor by saving their rights. It seems that § 122 is the controlling section on demurrer for defect of parties, *Wallace agt. Eaton*, 99.

A general allegation in a demurrer to an answer, that the facts therein do not constitute a defence, is sufficient, *Hyde agt. Conrad*, 112.
see Answer, 206.

DISCOVERY, an order for discovery may be enforced before issues joined in the cause, *Miller agt Mather*, 160.

An application for discovery or inspection of books, papers, &c., must be made upon petition, *Dole agt. Fellows*, 451.

DIVORCE, an issue in a divorce case may be referred by consent of parties,
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EQUITABLE RELIEF, *see Pleading*, 188, 216, 272.
see Answer, 192, 470, 476.

EVIDENCE, in proceedings for publication in case of a non resident defendant, the fact of non residence is evidence that the defendant can not, after due diligence be found within this state, *Vernam agt. Holbrook*, 3.
see Witness, Dodge agt. Averill, 8.

Consent to use as testimony what the law will not recognize as such, can not avail, although it be incorporated in the report of a referee, *Litchfield agt. Burwell*, 341.

In proceedings to perpetuate testimony, it must be made to appear that the object is in good faith to perpetuate testimony, *Paton agt. Westervelt*, 399.

EXECUTION, where an execution contains all the requisites of § 289, it is sufficient. It need not be "in the name of the people," nor "tested," nor on its face "returnable in sixty days," *Park agt. Church*, 381.
see Proceedings, Supplementary, &c.

EXECUTORS, it seems that foreign executors may foreclose a mortgage in this state without taking out letters testamentary here, *Averill agt. Taylor*, 476.

EXEMPTION, when a horse or team is exempted, *Wheeler agt. Cropley* 288.
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F EES, what fees a county clerk is entitled to under the Code, as clerk of the Supreme Court, 11.

Attorneys and counsel fees are not recoverable in summary proceedings to recover the possession of land, against the adverse party, *Patridge agt. Ford*, 21.

Fees of justice must be paid on serving notice of appeal (see *Appeal*), *Van Heusen agt. Kirkpatrick*, 422.

see *Surrogate, Gardner agt. Brown*, 351.

It is no ground for a readjustment of costs that the clerk refuses to allow 50 cents for entering judgment. This fee is his and he has a right to refuse it, *Schermerhorn agt. Van Voast*, 458.

FOREIGN CORPORATION. see *Practice*, 96, 183.

G UARDIAN, the facts upon which a plaintiff relies for judgment against infant defendants must be established by legal proof, notwithstanding the attorney for their guardian may have consented that judgment be taken on the report of a referee, *Litchfield agt. Burwell*, 341.

H UDSON RIVER R. R. COMPANY, their obligation by their charter to pay laborers, *Warner agt. The Hudson River Rail Road Co.*, 454.

I MPERTINENCE IN PLEADING, see *Pleading*, 53.

facts constituting an equitable defence to a legal demand, will not be struck out as irrelevant, *Burget agt. Bissell*, 192.

I NJUNCTION, a creditor of insolvent partners may have injunction to protect partnership property, *Dillon agt. Horn*, 35.

An application to dissolve an injunction made on the pleadings, the answer being verified, must be regarded as made on affidavits, and affidavits may be read in opposition, *Schoonmaker agt. Dutch Church*, 265.

Contra also see *Miliken agt. Cary*, 272.

the complaint can not be treated as an affidavit, *id.*

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(Florence agt. Bates, 2 *Sand.* 675, Krom agt. Hogan, 4 *How.* 225.

Contra, Hartwell agt. Kingsley, 2 *Sand.* 674, and note.)

the only inquiry now on an application for injunction is whether the act complained of will produce injury to the plaintiff, *Cure agt. Crawford*, 293.

Contra, see *Wordsworth agt. Lyon*, 463.

A mere refusal to pay a debt, whether debtor be solvent or not, is not cause for issuing an injunction, *Pomeroy agt. Hindmarsh*, 437.

nor is it sufficient that defendant threatens to make an assignment for the benefit of his creditors, *id.*

suspicion, belief and information are not sufficient, *id.*

It is not the province of the Supreme Court to interfere by *injunction*, where a remedy is given by appeal, *Woodworth agt. Lyon*, 463.

to authorize an injunction it must appear that plaintiff is entitled to the final relief demanded according to law, independent of the Code, *id.*
Cure agt. Crawford, ante 293, *disapproved*.

INTEREST, to recover *annual* interest upon the whole principal payable in installments, words must be used clearly to express that intention, *Bander agt. Bander*, 41.

ISSUE, see *Pleading*.

JUDGMENT, the decision of a motion on a demurrer as frivolous, is a judgment, *King agt. Stafford*, 30.

Where judgment is pronounced in open court, holden by eight judges, without any dissent at the time, neither party can go behind such public act to show that there was equal division of opinion among the judges, *Mason agt. Jones*, 118 (*Court of Appeals*).

It seems that the Court of Appeals can order an affirmance where there is an equal division of the judges, *id.*

Where a complaint is on separate and distinct bills, or accounts, and the answer denies one bill only, and the balance claimed specifically in the language of the complaint the plaintiff may have judgment for the accounts not denied by the answer, *Tracy agt. Humphrey*, 155.
 but the answer can not be stricken out on the ground of falsity where it is verified, *id.*

see *Appeal*, 200, 201.

see *Motion to dismiss complaint*.

see *Confession of judgment*, 322, 381.

A judgment in the hands of an assignee who purchased with notice and with no new consideration, is liable to be set off against the assignor, *Noxon agt. Gregory*, 339.

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JURISDICTION, if motion be made and granted by default in the wrong county, the order is not void for want of jurisdiction, *Blackmar agt. Van Inwager*, 367.

JUSTICE OF THE PEACE, a justice of the peace had no power to take judgment by confession for more than \$100, by Code of 1848, *Dan-iels agt. Hinkston*, 322.
 see *Appeal*, 323, 422.

LANDLORD AND TENANT, tenants from *year to year* may be removed by summary proceedings, *Prouty agt. Prouty*, 81.
 such a tenant is included in the term "tenants at will" in the statutes of '30 and '49, and may be removed upon one month's notice to quit, *terminating with the year, id.*
 the affidavit should state that tenant holds over *without permission of his landlord, id.*
 Distinction between sub lease and assignment of the original term, *Linden agt. Hepburn*, 188.
 see also, *Pleading, id.*
 The provision of the Revised Statutes (2 R. S. 516, § 47) is inconsistent with the Code, and therefore repealed, *Cure agt. Crawford*, 293.
 proceedings to remove tenant may be stayed if they would produce injury to plaintiff, *id.*
Contra, Woodworth agt. Lyon, 463.

LIEN OF ATTORNEY, the lien of an attorney for his costs is subordinate to the equities existing between the parties, *Noxon agt. Gregory*, 339.

LIMITATION, see *Appeal, Bank of Geneva agt. Hotchkiss*, 478.

LUNATIC, an action can not be brought against a lunatic, judicially declared such without application to the court. The old practice should be pursued by petition to the court for relief or application for leave to bring an action, *Soverhill agt. Dickson*, 109.

MANDAMUS, see *Appeal, People ex rel. Cahoon agt. Dodge*, 47.

MISNOMER, misnomer of the court—called "General Sessions of the Peace" instead of "Court of Sessions" as designated by the Code, immaterial, *People agt. Hawkins*, 1.

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MOTION, costs of—see *Notice*, 134.

costs of motion in the regular progress of the suit need not be inserted in the order, but follow of course to the prevailing party, *Thomas agt. Clark*, 375.

see *Jurisdiction*, *Blackmar agt. Van Inwager*, 367.

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MOTIONS, that part of § 401 which enacts "motions must be made within the district in which the action is triable, or in a county adjoining that in which it is triable, &c.," applies exclusively to motions made upon notice, *Peebles agt. Rogers*, 208.

"The county where the action is triable" includes any county in which, according to sections 123, 124, 125, the plaintiff is at liberty to have the action tried, *id.*

Where notice of motion asked to *strike out* answer as frivolous, "or for such other relief, &c." held, that judgment, on account of its frivolousness, could not be given, *Darrow agt. Miller*, 247.

Motion to dismiss complaint, *Cusson agt. Whalon*, 302.

A motion for judgment for not serving the complaint must be made in that district, or a county adjoining the county in which venue is laid in another district, *Johnston agt. Bryan*, 355.

NEW TRIAL, on application and payment of damages and costs, as a matter of right, a party is entitled to a new trial in ejectment, *Rogers agt. Wing*, 50.

NE EXEAT, the writ of ne exeat is not abolished by the Code. To authorize its issue, facts, not mere apprehensions, must be stated, *Forrest agt. Forrest*, 125.

NON RESIDENT, the statute does not expressly require the filing of the affidavits on which an order is made for publication in case of a non resident defendant, *Vernam agt. Holbrook*, 3.

in such proceedings, the fact of non residence is evidence that the defendant can not, after due diligence be found within this state, *id.*

see *Publication*, *Evertson agt. Thomas*, 45.

see *Foreign Corporation*.

Although the Code authorizes an attachment against a non resident in an action for the recovery of money, whether for a wrong or on contract, it is only in the latter case that a suit can be commenced unless defendant can be served within this state. *Hernstein agt. Matthewson*, 196.

see *Executors*, *Averill agt. Taylor*, 477.

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- NOTICE**, notice of trial served on the 11th for the 21st, is good, *Dayton agt. McIntyre*, 117.
- So much of a rule entered by *default* upon motion, as grants costs, to abide the event of the suit, will be set aside for irregularity, if no notice of application for costs is given in notice of motion, *Northrop agt. Van Deusen*, 134.
- see *Costs*, *Dix agt. Palmer*, 233.
- see *Motion*, *Darrow agt. Miller*, 247.
- In *partition*—on sales of lands in the city of New York, the notice must be for six weeks, *Romaine agt. McMillen*, 318.

- PARTY**, see *Actions*, *Dodge agt. Averill*, 8.
- see *Demurrer*, *Wallace agt. Eaton*, 99.
- see *Amendment*, *Russell agt. Spear*, 142.
- see *Costs*, *Giles agt. Halbert*, 319.

The 121st section of the Code, so far as it is made applicable to existing suits commenced before the Code, and to transfers made before that time is unconstitutional, *Vrooman agt. Jones*, 369.

One of several plaintiffs having assigned to his coplaintiff after suit commenced and cause referred and some testimony taken, plaintiffs were allowed to amend, *Davis agt. Schermerhorn*, 440.

PENDENCY of another suit, see *Pleading*, 51.

PERSONAL PROPERTY, see *Claim*, &c.

PLACE OF TRIAL, the trial of a cause for the convenience of witnesses, should be had in the county where witnesses reside, though they may be required to travel a greater distance than to the court house of an adjoining county, *People agt. Wright*, 23.

supposed circumstances which render it doubtful whether a fair trial can be had in the county to which it is moved to change the place of trial, are no cause for refusing the motion, *id.*

Motion to change the place of trial can not be made *before* the issues in the cause are settled, *Hartman agt. Spencer*, 135.

The venue in a complaint is to be fixed irrespective of convenience of witnesses where some or one of the parties reside, if either reside in the state (sections 125 and 126 of the Code in connection with the 46th and 47th sections of the judiciary act), *Moore agt. Gardner*, 243.

a change of the place of trial for the convenience of witnesses, is properly made, when the venue has been fixed in the proper county, *id.*

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PLEADING AND PLEADINGS, a party can not demur and answer to the same pleading, *Spellman agt. Weider*, 5.

where this is done, the remedy is to move to strike out one of them or to compel the defendant to elect by which he will abide, *id.*

the plaintiff can not in such case, move for judgment on account of the frivolousness of the demurrer, *id.*

what facts should be stated in a complaint against the makers and endorsers of a promissory note, when they are all united in the same action under § 120 of the Code, *id.*

An answer is bad, where it controverts no allegation of the complaint, and sets up no new matter in bar, but merely denies a conclusion of law, *McMurray agt. Thomas*, 14.

an answer is bad, which merely alleges that the note sought to be recovered was obtained by fraud, and omits to set out any facts showing the existence of such fraud, *id.*

Motion to strike out redundant matter must be made before giving notice of trial, *Esmond agt. Van Benschoten*, 44.

A plea of the pendency of a suit in another estate for the same cause of action, is bad, *Burrows agt. Miller*, 51.

Impertinent and scandalous matter struck out with costs, *Carpenter agt. West*, 53.

it seems any one affected thereby may move to strike out such scandalous matter, even though not a party to the suit, *id.*

impertinence includes irrelevancy, redundancy, and prolixity, *id.*

The objection that summons was not properly served is not available by answer or demurrer; but only by motion, *Nones agt. Ins. Co.*, 96.

Demurrer for non joinder of parties is well taken where it appears that the court can not determine the controversy, without prejudice to rights of others, nor by saving their rights, see *Demurrer*, 99.

It is not necessary to charge an endorser, to aver a presentment and demand at the place specified in the note, in a complaint, *Gay agt. Paine*, 107.

see *Demurrer*, 112.

see *Answer*, 146.

see *Judgment*, 155.

Several causes of action in slander can not be united in the same complaint unless they are separately stated, *Pike agt. Van Wormer*, 171.

it seems, that the separate statement of a cause of action, is equivalent to a separate count, under the former rules of pleading, *id.*

the words "you have passed counterfeit money, &c." without any colloquium, or allegation of guilty knowledge and intent to defraud, will not sustain an action. The words "you are a bogus pedler," without averment, showing the meaning of the term, are not actionable, *id.* words imputing that plaintiff had had the pox, but without asserting the

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present continuance of the disease, and without alleging special damages, are not actionable, *id.*

A complaint demanding a judgment of forfeiture of a term of years, and also praying an injunction restraining defendant from making alterations, is inconsistent. Either may be pursued separately but not both at once. The Code has not changed the inherent difference between legal and equitable relief, although it has abolished the inherent difference between legal and equitable remedies, *Linden agt. Hepburn*, 188.

see *Answer*, *Burget agt. Bissell*, 192.

see *Answer*, *Howard agt. Michigan R. R. Co.*, 206.

All those preexisting rules of pleading at common law or in equity, which are not expressly abrogated, and which can properly be made applicable under the new system (the code), remain in force, *Rochester City Bank agt. Suydam*, 216.

if the case and relief sought to be of an equitable nature, the rules of chancery pleading are to be applied; otherwise those of the common law, *id.*, *Contra*, 272.

Sham pleadings and frivolous pleadings, *Darrow agt. Miller*, 247.

Although there are actions of legal and equitable cognizance between which there is still a distinction, yet but one system of pleading is applicable to both. There is no distinction between the pleadings in actions at law and suits in equity. The facts, without the evidence or legal conclusions should be stated, *Milliken agt. Cary*, 272.

The cause is deemed at issue upon the service of the pleading joining issue in the cause, notwithstanding the right to amend, *Cusson agt. Whalon*, 302.

see *Answer*, 321.

The Code not only abolishes the distinction between law and equity in remedies but also in proceedings, *Williams agt. Hayes*, 470.

the criterion, as to relevancy or redundancy, is whether the allegation can be made the subject of *material issue*, *id.*

The cases on this subject collected, *id.*

It is the right of the adverse party to have the matter improperly inserted, removed, so that the record shall present nothing but issuable facts, *id.*

see *Answer*, *Averill agt. Taylor*, 476.

PRACTICE, the statute does not expressly require the filing of the affidavits on which an order is made for publication in case of a non resident defendant, *Vernam agt. Holbrook*, 3.

A party can not demur and answer to the same pleading, *Spellman agt. Weider*, 5.

where this is done, the proper remedy is to move to strike out one of them, or to compel the defendant to elect by which he will abide, *id.*

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the plaintiff can not in such case move for judgment on account of the frivolousness of the demurrer, *id.*

The decision of a motion on a demurrer as frivolous, is a judgment. An appeal from such decision must be taken as from a judgment—not from an order, *King agt. Stafford*, 30.

in such case defendant is entitled to notice of assessment of damages. The provisions of the R. S. in relation thereto are still in force, *id.*

By noticing a cause for trial a party waives the right of moving subsequently to strike out redundant matter from his adversary's pleading, under § 160 of the Code. *Esmond agt. Van Benschoten*, 44.

Decision of county judge on appeal from a justice's judgment taken before the Code, may be filed after twenty days, *People ex rel. Cahoon agt. Dodge*, 47.

New trial in ejectment, see *New Trial*, 50.

Impertinent matter struck out, 53, 439, 470.

The objection that a summons was not properly served, is not available by answer or demurrer, but only by motion. The meaning of the language of the Code allowing it to be set up as a defence "that the court has not jurisdiction of the person" is that the person is not subject to the jurisdiction of the court; not that process was improperly served, *Nones agt. Hope Ins. Co.*, 96.

Upon the presentation of petition, for the appointment of commissioners of appraisal of damages in taking land for a rail road, is the proper time to raise questions of regularity in the proceedings. Too late to raise such objections on a motion for confirmation of report, *N. Y. and Erie Rail Road agt. Corey*, 177.

as to proceedings of such commissioners generally, see *id.*

see also *Appeal*, *id.*

To authorize legal service upon a foreign corporation through its managing agent, his agency must extend to *all* the transactions of the company, *Brewster agt. Michigan Rail Road Co.*, 183.

where service of a summons is made upon a proper officer of a foreign corporation, the court have jurisdiction only to subject the property of such corporation within this state to the payment of its debts by a judgment *in rem*. *id.*

see *Answer*, 206.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION, where the judge may, in his discretion, make an order to apply the property of the debtor, or to appoint a receiver, *Corning agt. Tooker*, 16.

when a receiver should be appointed, &c., *id.*

the duty of a referee on taking the examination, &c., *id.*

Where a third person, not a party, is in possession of property of the debtor, liable to execution, the remedy of the creditor is to levy on

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the goods, under his execution, or to institute an action, in the nature of a creditor's bill, *Dorr agt. Noxon*, 29.

a receiver can only be appointed in such a case, on notice to the judgment debtor, *id.*

A motion to vacate the order may be made to the court, without first applying to the judge before whom the proceedings are pending, *Lindsay agt. Sherman*, 308.

an appeal from an *ex parte* order, made by a judge at chambers, will not lie at the general term, under § 350 of the Code, *id.*

Upon the return of an execution *within* the sixty days, proceedings supplementary may be commenced, *Livingston agt. Cleaveland*, 396.

Where proceedings supplementary to execution are instituted under the Code, the order for the debtor's examination under the 292d section gives the judgment creditor the same lien upon the debtor's equitable assets which he acquired under the former practice by the commencement of a suit by creditor's bill. And the orders authorized by the 297th and 298th sections themselves, and without an assignment by the debtor, divest his title in the personal property and vest it in the receiver, *Porter agt. Williams and Clark*, 441.

W., on the 5th of January, assigned to C. all his property for the benefit of creditors, with power to sell *either for cash or credit*. This assignment is void (2 *Comst.* 365). On the 28th of March an order was made in proceedings supplementary to execution against W., and on the 4th of April P. was appointed a receiver of W.'s property. On the 30th of March W. executed a further instrument to C. declaring that it was intended that C. should sell for *cash only*, *id.*

Held that P., the plaintiff had acquired a lien on the 28th of March, which rendered ineffectual the instrument of the 30th of March, even if otherwise of any effect, *id.*

Held, also, that W. could not at any time after the execution of the assignment to C. revoke the authority therein contained to sell upon credit, and that the instrument subsequently executed was of no avail to render the assignment valid, *id.*

In proceedings supplementary to execution under § 292 of the Code, a county judge has no authority or jurisdiction to issue an order for the defendant to answer, &c., until after an execution has been issued *against his property*. And this fact, and all others upon which jurisdiction rests, must be shown affirmatively; they are not to be deduced by inference or presumption, *People ex rel. Williams agt. Hulburt, County Judge*, 416.

where the creditor claims the application of a demand or debt due to the debtor from a third person, and such demand or debt is denied, the judge can not proceed and try such disputed question of fact; he is only authorized to issue an order forbidding the transfer or other dis-

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position of the claim, until a sufficient opportunity is given to the receiver to commence an action (§ 299), *id.*

a receiver may be appointed in such case, without any reference to the return of the execution, *id.*

the judge has no authority to order an assignment from the debtor to the receiver. Nor is an assignment necessary, as the title and authority for such purposes to rights and property of this description vests in the receiver immediately upon his appointment (*see Porter agt. Williams and Clark, ante page 441*). In relation to real estate, an assignment is necessary to transfer the title to the receiver. And it seems that the *Supreme Court* has power, without any statutory provision, to order such an assignment, *id.*

a demand of the kind mentioned in this case, can not be levied upon and sold under an execution against the debtor, *id.*

a judge has no power to adjourn these proceedings from time to time, without the consent of the party against whom the proceeding is had, *id.*

PROCEEDINGS TO DETERMINE CLAIMS TO REAL ESTATE, must be commenced under the Revised Statutes, and not by the Code, *Crane agt. Sawyer*, 372.

PROMISSORY NOTE, a negotiable promissory note endorsed by the payee (as owner) and by him deposited in a bank for collection, and by that bank transferred in the usual course of exchange to another bank, for the same purpose, does not create any title in the latter bank against the payee, *Van Namee agt. The Bank of Troy*, 161.

PUBLICATION, service by

The facts to entitle a creditor to an order for publication, should be stated positively and not on information and belief, *Evertson agt. Thomas*, 45.

RECEIVER, *see* Proceedings supplementary, &c.

REFEREE AND REFERENCE, in supplementary proceedings—duty of, 16, 29.

A referee appointed to report the *facts* is not at liberty to report the *evidence* at large, *Dorr agt. Noxon*, 29.

What reports require confirmation by the court on motion, *Griffing agt. State*, 205.

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A divorce case may be referred by consent of parties, 306.

A referee who acts by virtue of stipulation of parties, unsanctioned by rule of court, acts without authority, *Litchfield agt. Bennett*, 341.

Review of Referees Report, 157, 158.

On appeal from a judgment upon a report of referee, the date of issue in the general term calendar must be the day of filing the report, *Gould agt. Chapin*, 358.

An order of Supreme Court denying a motion for stay of proceedings on the judgment and for liberty to move to set aside a report of referees without appeal, is not an appealable order. *Enos agt. Thomas*, 359.

After judgment the only mode of reviewing the decision of referees is by appeal from the judgment, 361.

RELIGIOUS SOCIETIES. rights, liabilities and powers of. *Voorhees agt. Presbyterian Church of Amsterdam*, 58.

Their rights as to burial grounds, *Schoonmaker agt. Dutch Church of Kingston*, 265.

REPLY, see *Answer*, 146.

see *Pleading*, 206.

SCHOOL LAW, the free school law generally, 417.

SERVICE OF PAPERS, where service made by mail by depositing in a post office other than where attorney resides, the attorney who served takes the risk of their being received in time, *Peebles agt. Rogers*, 208.

The time of service, when regularly made by mail, is the time of mailing, not of receiving, *Van Horne agt. Montgomery*, 238.

Where an attorney signs his name and place of residence to papers, the service of papers by mail must be directed to the post office at that place, *Rowell agt. McCormick*, 337.

Service of a summons is defective where sheriff's certificate does not mention any cause in which it was served, *Litchfield agt. Burwell*, 341.

an admission of service of a summons is not good without some evidence of its genuineness, *id.*

see *Verification*, 353.

Where a summons is served stating that the complaint will be filed in the clerk's office of a certain county, motion for judgment in favor of defendant for not serving complaint, must be made in that district or an adjoining county, *Johnston agt. Bryan*, 355.

SET OFF, see *Judgment*, *Naxon agt. Gregory*, 339.

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SLANDER, *see Pleading, Pike agt. Van Wormer*, 171.

SUMMONS, a summons issued without mentioning the court from which it emanates, is defective, *Dix agt. Palmer*, 233.

See to same effect, *James agt. Kirkpatrick*, 241.

A notice of appearance by defendant waives the irregularity, 233.

[So too if complaint is served with summons, 4 *How*, 154.]

see Service of Papers, 341, 355.

SURROGATE, a surrogate will be compelled to make a return to appeal within a reasonable time, although his fees have not been paid, *Gardner agt. Brown*, 351.

An appeal from a judgment of Supreme Court, reversing a surrogate's decree, if premature is brought before the roll if filed, *McMahon agt. Harrison*, 360.

TIME, *computation of*—The day of service should be excluded and the first day of the court included, for service of notice of trial, *Dayton agt. McIntyre*, 117.

notice served on the 11th for the 21st, held good, *id.*

Twenty days is reasonable time to serve a complaint after demand.

Colvin agt. Bragden, 124.

To answer, reply, &c.—

A county judge has power independent of the Code, to grant an order extending the time to answer. *Peebles agt. Rogers*, 208.

see also Motions, id.

The time of service of copy complaint, when made by mail, is the time when it is mailed, not when received. 238.

see Answer, Mandeville agt. Winne, 461.

TORT, in actions for a tort commenced before the Code, a defendant on whom process was not served, and who has not appeared, can not be a witness for codefendant, whom he is liable to indemnify in case of recovery, *Dodge agt. Averill*, 5.

he is nominally a party and interested (§ 398-9), *id.*

TRIAL, place of—*see Place of Trial*.

The argument of an issue of law, either at general or special term, is a trial, 11.

TROVER, a bailee of a chattel is answerable, in trover, on showing a delivery to a person not authorized to receive it, *Esmay agt. Fanning*, 228.

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UNDERTAKING, an undertaking in the form of a penal bond is good, where it contains the conditions required by the Code, *Conklin agt Dutcher*, 386.

VENDOR AND VENDEE, *Kneiss agt. Seligman*, 425.

VERIFICATION, where the verification of a complaint is made by the attorney instead of the party, the reasons must be stated why it is not made by the party. Otherwise it may be treated as a complaint not verified, *Fitch agt. Bigelow*, 237.

and in such case the *means of knowledge* should be set forth, *Van Horne agt. Montgomery*, 238.

An answer which is required to be verified is not duly served without a copy of the affidavit of verification, with the name of the magistrate, *Graham agt. McCoun*, 353.

WITNESS, in actions for tort commenced before the Code, a defendant on whom process was not served, and who has not appeared, can not be a witness for a codefendant, whom he is liable to indemnify in case of recovery, *Dodge agt. Averill*, 8.

he is nominally a party and interested (§ 398-9), *id.*

Each of two defendants charged with a joint offence, can not be a witness for the other, *Munson agt. Hagerman*, 223.

See further on this point, and qualifying above, *Hallenbeck agt. Van Valkenburgh*, 281; *Selkirk agt. Waters*, 296.

Contra, Mechanics' and Farmers' Bank agt. Rider and Wilbur, 401.

An affidavit for allowance of travel fees of a witness should state the distance traveled by him as such, *Schermerhorn agt. Van Voast*, 458.

a party in interest can not be a witness, consequently can not be allowed fees as such, *id.*

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